(24,590)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 374.

THE BALTIMORE & OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

HARVEY W. C. WHITACRE.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 25, 1916.

corporation duly incorporated under the laws of the State of Maryland, since before the happening of the injuries hereinafter complained of, and was at the time of the happening of the said injuries, and still is, a common carrier by railroad, engaged in commerce between the States of the United States, and particularly between the States of Maryland, Pennsylvania and West Virginia, and that the said Harvey W. C. Whitacre, on or about the 23rd day of June, 1913, while a servant of the said Baltimore and Ohio Railroad Company and in its employ and service, at or near the City of Cumberland, Allegany County, State of Maryland, in connection with the receipt, delivery and transfer in transit of property being transported by railroad from one State of the United States to another State of the United States, to wit: to and from the State of Maryland into the State of West Virginia and employed as a brakeman on the freight cars of the defendant, which cars were then and there being transferred and transported by railroad from the said City of Cumberland, State of Maryland, to certain other points in the State of West Virginia, which cars were being used then and there
4 for the purpose of commerce between the State- of Maryland and West Virginia, and loaded with coal freight for shipment from the said State of Maryland, into the State of West Virginia, and it then and there became and was the duty of the said defendant to provide safe appliances, machinery, works and other equipment for the said railroad and its employees, and to protect its employees from any injury that might result from unsafe and dangerous or inadequate machinery and appliances; and that the said plaintiff was then employed by the said carrier in such commerce, and that while the said Harvey W. C. Whitacre was so employed by said carrier in such commerce, at or near the City of Cumberland as aforesaid, and in the discharge of his duty as an employee of the said railroad company, the freight train on which the said plaintiff was employed, was standing on the tracks of the said railroad, in the South Cumberland Yards of the said Railroad Company, which said cars were then and there being used for the purposes of interstate commerce, that is to say, for the purpose of transporting said coal freight from the State of Maryland to the State of West Virginia, and that then and there, on the said 23rd day of June, 1913, the said Harvey W. C. Whitacre while so employed, and in discharge of his duties as a servant of the said Railroad Company, left the engine and the said train of cars in the said yard as aforesaid, on the said 23rd day of June, 1913, just before the said train started on its way from the said City of Cumberland, State of Maryland, to the said State of West Virginia, and stepped across the said yard in order to procure a tin cup for the use of himself and the other trainmen on the said train of cars, which was necessary for the use of said trainmen as employees of the said road, to carry on the engine of the said train; and while the said plaintiff was then and there in the said yard, and in the exercise of due care passing along said yard in the night time, he fell into a cinder pit, which was built and negligently maintained in the said yard of the said

defendant; said cinder pit being filled with water, and the top thereof being covered with ashes, so that the cinder pit was concealed in the darkness and the plaintiff could not see the pit and avoid the dangerous place, and that the said plaintiff was then and there exercising due care and caution on his part, but that the said cinder pit was not protected by railing or otherwise, but was negligently maintained by the defendant, and was a dangerous appliance maintained by the said Railroad Company in the said yard, and that in falling into the said cinder pit the said plaintiff was thrown against the iron rails which ran across and over the said cinder pit, and his ribs were broken, his chest crushed in, his spine was injured, and he was thereby permanently injured and disabled, and as a consequence thereof has been confined to his room almost ever since, and can only walk with the greatest difficulty, and has suffered the most intense physical and bodily pain and mental anguish, all of which injuries were caused by reason of the negligence of the defendant and its agents in so carelessly and negligently maintaining the said cinder pit without adequate protection for the said employees; and that the said plaintiff was exercising due care and caution in passing across the said yard from the said train, where he had gone to enter upon his duties as an employee of the said defendant to assist in the transporting of the said train from the said State of Maryland into the said State of West Virginia, and that the said injuries occurred, after the said plaintiff has entered upon his duties as such brakeman and *and* employee of the defendant, and that the said injuries resulted in whole by reason of the negligence of the officers, agents and employees of the said defendant, or by reason of a defect and insufficiency due to its negligence in its cars, engines, appliances, machinery, works or other equipment; and that the said injuries were wholly caused by the negligence of the said defendant and its servants, and were not caused by any negligence of the plaintiff; and that the said plaintiff is and has been a citizen and resident of the State of Maryland since before the happening of the said injuries, and that as a result of the said injuries the said plaintiff has been permanently disabled in his spine, his chest, his legs and otherwise, and is wholly prevented from pursuing any occupation, and has been put to great expense as a result thereof, and therefore he brings this suit and claims $20,000 damages.

ALBERT A. DOUB,
Attorney for Plaintiff.

6 In the Circuit Court for Allegany County.

No. 124, Tr., Jan. Term, 1914.

HARVEY W. C. WHITACRE
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

Now comes the defendant, the Baltimore and Ohio Railroad Com
pany, and by George A. Pearre, its attorney, for a plea, says:
That it did not commit the wrong alleged.

GEO. A. PEARRE,
Attorney for Defendant.

Rule Replication.

Motion and leave to withdraw plea and demur. /14, Feb.
Demurrer sustained. Motion and leave to amend declaration b
adding 2nd count, and same filed. Demurrer to each count. D
murrer to first count sustained; also demurrer sustained as to secon
count and motion and leave to amend; and declaration amended b
adding a third count as follows, to wit:
(2nd and 3rd Counts as follows.)

Second Count.

And for that the Baltimore and Ohio Railroad Company is a
has been a corporation duly incorporated under the laws of the Sta
of Maryland, since before the happening of the injuries hereinaf
complained of, and was at the time of the happening of t
7 injuries, and still is, a common carrier by railroad, engag
in commerce between the States of the United States, a
particularly between the States of Maryland, Pennsylvania and W
Virginia, and that the said Harvey W. C. Whitacre, on or abo
the 23rd day of June, 1913, while a servant of the said Baltim
and Ohio Railroad Company, and in its employ and service, at
near the City of Cumberland, Allegany County, State of Maryla
in connection with the receipt, delivery and transfer in transit
property being transported by railroad from one state of the Uni
States to another state of the United States, to wit: to and from
State of Maryland, into the State of West Virginia, and employ
as a brakeman on the freight cars of the defendant, which cars w
then and there being transferred and transported by railroad fr
the said City of Cumberland, State of Maryland, to certain ot
points in the State of West Virginia, which cars were being u
then and there for the purpose of commerce between the State
Maryland and West Virginia, and loaded with coal freight for sh
ment from the said State of Maryland into the State of West V
ginia, and that under and by virtue of an Act of Congress of

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United States, duly passed and approved April 22nd, 1908, entitled "An Act relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases;" and it then and there became and was the duty of the said defendant to provide safe appliances, machinery, works and other equipment for the said railroad and its employees, and to protect its employees from any injury that might result from unsafe and dangerous or inadequate machinery and appliances; and that the said plaintiff was then employed by the said carrier in such commerce, and that while the said Harvey W. C. Whitacre was so employed by said carrier in such commerce, at or near the City of Cumberland as aforesaid, and in the discharge of his duty as an employee of the said Railroad Company, the freight train on which the said plaintiff was employed was standing on the tracks of the said railroad in the South Cumberland yards of the said Railroad Company, which said cars were then and there being used for purposes of interstate commerce, that is to say, for the purpose of transporting said coal freight from the State of Maryland to the State of West Virginia, and that it was the custom and duty of the defendant to provide drinking water in a cooler on the tank of said engines and trains and also a tin cup for the use of the train crew in charge of such trains so used in interstate commerce, and

8 that defendant's servant, whose duty it was to provide and place a tin cup on said engine, failed and neglected to provide such cup for said engine, and that upon discovery by the crew of said train that said cup had not been provided, the plaintiff was ordered by his superior in charge of said engine to go after a tin cup and that in so doing the plaintiff was acting within the scope of his duties as an employee on said train, and that then and there on the said 23rd day of June, 1913, the said Harvey W. C. Whitacre, while so employed and in discharge of his duties as a servant of the said Railroad Company, left the engine and the said train of cars in the said yard as aforesaid on the said 23rd day of June, 1913, just before the said train started on its way from the said City of Cumberland, State of Maryland, to the said State of West Virginia, and stepped across the said yard in order to secure a tin cup for the use of himself and the other trainmen on the said train of cars, which was required for the use of the said trainmen as employees of the said railroad, to carry on the engine of the said train, and which the defendant negligently failed to provide; and while the said plaintiff was then and there in the said yard, and only a short distance from said engine, and in the exercise of due care passing along said yard in the night time, he fell into a cinder pit, which was built and negligently maintained in the said yard of the said defendant; said cinder pit being filled with water, and the top thereof being covered with ashes, so that the cinder pit was concealed in the darkness, and the plaintiff could not see the pit and avoid the dangerous place, and that the said plaintiff was then and there exercising due care and caution on his part, but that the said cinder pit was not protected by railing or otherwise, but was negligently maintained by the defendant, and was a dangerous appliance

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maintained by the said Railroad Company in the said yard, and that in falling into the said cinder pit the said plaintiff was thrown against the iron rails which ran across the said cinder pit, and his ribs were broken, his chest crushed in, his spine injured, and he was thereby permanently injured and disabled, and as consequence thereof has been confined to his room almost ever since, and can only walk with the greatest difficulty, and has suffered the most intense physical and bodily pain and mental anguish, all of which injuries were caused by reason of the negligence of the defendant and its agents in so carelessly and negligently maintaining the said cinder pit without adequate protection for the said employees; and that the said plaintiff was exercising due care and caution in passing across the said yard from the said train, where he had gone to enter upon his duties as an employee of the said defendant to assist
9 in the transporting of the said train from the said State of Maryland into the said State of West Virginia, and that the said injuries occurred after the said plaintiff had entered upon his duties as such brakeman and employee of the defendant, and that the said injuries resulted in whole by reason of the negligence of the officers, agents and employees of the said defendant, or by reason of a defect and insufficiency due to the negligence in its cars, engines, appliances, machinery, works or other equipment; and that the said injuries were wholly caused by the negligence of the said defendant and its servants, and were not caused by any negligence of the plaintiff; and that the said plaintiff is and has been a citizen and resident of the State of Maryland since before the happening of the said injuries, and that as a result of the said injuries the said plaintiff has been permanently disabled in his spine, his chest, his legs and otherwise, and is wholly prevented from pursuing any occupation and has been put to great expense as a result thereof, and under and by virtue of the provisions of the said Act of Assembly, an action has accrued on the part of the said plaintiff against the said defendant, which said Act of Congress is hereby made a part of this declaration, and is hereto attached, and therefore he brings this suit and claims $20,000 damages.

FRANK A. PERDEW,
ALBERT A. DOUB,
Attorneys for Plaintiff.

Third Count.

And for that, the Baltimore and Ohio Railroad Company is and has been a corporation duly incorporated under the laws of the State of Maryland, since before the happening of the injuries hereinafter complained of, and was at the time of the happening of the said injuries, and still is a common carrier by railroad, engaged in commerce between the States of the United States, and particularly between the States of Maryland, Pennsylvania and West Virginia, and that the said Harvey W. C. Whitacre, on or about the 23rd day of June, 1913, while a servant of the said Baltimore and Ohio Railroad

Company, and in its employ and service, at or near the City of Cumberland, Allegany County, State of Maryland, in connection with the receipt, delivery and transfer in transit of roperty being transported by railroad from one state of the United tates to another state of the United States; to wit: to and from the tate of Maryland, into the State of West Virginia, and employed as brakeman on the freight cars of the defendant, which cars were ien and there being transferred and transported by railroad from ie said City of Cumberland, State of Maryland, to certain other oints in the State of West Virginia, which cars were being used then nd there for the purpose of commerce between the State of Maryland nd West Virginia, and loaded with coal freight for shipment from ie said State of Maryland into the State of West Virginia, and iat under and by virtue of an Act of the Congress of the United tates, duly passed and approved April 23, 1908, and titled "An Act elating to the Liability of Common Carriers by Railroad to their mployees in Certain Cases," and that it then and there became and as the duty of the said defendant to provide safe appliances, ma- hinery, works and other equipment for the said railroad and its mployees, and to protect its employees from any injury that might esult from unsafe or dangerous or insufficient or inadequate ma- hinery or appliances and that the said plaintiff on the said 23rd ay of June, 1913, was called as an employee in the night time for uty as an employee on one of the trains of the defendant, and as ich employee was required to be on the premises of the defendant i its yards on or before two o'clock A. M. on said date, and that the id plaintiff was then and there at two A. M. on said date in the id yard of the defendant and employed by the said carrier in such nterstate commerce, and that the said plaintiff in the discharge of is duty as an employee of said Railroad Company came to the said ain in said yard in response to the command of the defendant, for ie purpose of assisting in the transportation of said train, which was anding on the tracks of said railroad in the South Cumberland ards of said company, from the State of Maryland to the State of Vest Virginia, the cars and engine and freight of which train was ien and there being used for the purposes of interstate commerce, iat is to say, for the purpose of transporting coal freight from the tate of Maryland to the State of West Virginia; and that in order o enable the crew of the freight trains of the defendant so engaged n interstate commerce properly and safely to transport such trains, it was the custom, usage and duty of the defendant to provide 1 drinking water in a cooler on the tanks of all engines attached to trains engaged in interstate commerce, and also to provide in cups for the use of the train crew in charge of all such trains so sed in interstate commerce, and that the said defendant had in its mploy a person whose duty it was to provide all such engines with rinking water and drinking cups for the use of their respective rew during the period of transportation of said trains from the State f Maryland to the State of West Virginia, which drinking cups were wned and kept in the storm room of the defendant in the round ouse in said yard, and the defendant provided said cups and said

drinking water because it knew that the crews of said trains were not willing to transport said trains unless the said defendant provided such drinking water and tin cups for the use of said crew, and so to enable them the better and the more safely and the more comfortably to transport said trains, and that on the night aforesaid the defendant's servant, whose duty it was, under his employment, to provide and place one of said tin cups on said engine, in connection with which the said plaintiff was employed, failed and neglected to provide such cup and place the same on the said engine for the use of said crew; and that because of the failure of the said servant so to provide said cup for said engine, it then and there became and was the duty, according to custom, usage and the requirement of said company and its needs to see that a cup was provided; and that, according to the rules of said company, it was the duty then and there of each member of said crew, not only to discharge the special and regular duties imposed upon him, but any other duties which any member of said crew might discover had been neglected by any servant of said company which might be necessary for the movement of said train; and that the said plaintiff, under the rules of the said company, was then and there subject to the orders of the conductor of said train, or in his absence to the order of the engineer of said train, or in his absence to the orders of the fireman of the said engine, and that the conductor being absent and the engineer being absent, upon the discovery by the fireman of said engine attached to said train, that said cup had not been provided, the plaintiff was ordered and directed by the fireman of said engine, who was then in charge of said engine, to look up and search for the servant of said company who had charge of said cups, and to secure a cup and place the same on the said engine; and that the said plaintiff, in discharge of his duties, and acting under the direction of said fireman, and within the scope of his employment, stepped a few feet from said engine toward said round house or store room in search of said servant who
12 had charge of said cups, for the purpose of securing such cup and placing the same on such engine, for the use of said crew, before the said train started on its way from the City of Cumberland, Maryland, to the State of West Virginia; and that while the said plaintiff, in the exercise of due care, was then and there in said yard, and near said engine and looking for said servant who had charge of said cups, in the night time, on the said 23rd day of June, 1913, he suddenly fell into a large cinder pit, which was built and negligently maintained in the said yard of the said defendant, which pit is and was situated in the central portion of said yard, where it is surrounded by tracks for trains used for purposes of interstate traffic, and where employees of defendant are required in numbers from time to time, both in the night and in the day, in the discharge of their duties in the movement of trains and for other purposes; said cinder pit being filled with water, and the top thereof being covered with ashes, so that the cinder pit was concealed in the darkness, and the plaintiff could not see the pit and avoid the dangerous place, and that the said plaintiff was then and there exercising due care and caution on his part, but that the said cinder pit was not protected by

railing or otherwise, but was negligently maintained by the defendant, and was a dangerous appliance maintained by the said railroad company in the said yard, and that in falling into the said cinder pit, the said plaintiff was thrown against the iron rails which ran across the said cinder pit, and his ribs were broken, his chest crushed in, his spine was injured, and he was thereby permanently injured and disabled, and as a consequence thereof has been confined to his room almost ever since, and can only walk with the greatest difficulty, and has suffered the most intense physical and bodily pain and mental anguish, all of which injuries were caused by reason of the negligence of the defendant and its agents in so carelessly and negligently maintaining the said cinder pit without adequate protection for the said employees; and that the said plaintiff was exercising due care and caution in passing across the said yard from the said train, where he had gone to enter upon his duties as an employee of the said defendant, to assist in the transporting of the said train from the said State of Maryland into the State of West Virginia, and that the said injuries occurred after the said plaintiff had entered upon his duties as such brakeman and employee of the defendant, and that the said injuries resulted in whole by reason of the negligence of the officers, agents and employees of the said defendant, or by
13 reason of the defect and insufficiency due to its negligence in its cars, engines, appliances, machinery, works or other equipment and that the said injuries were wholly caused by the negligence of the said defendant and its servants, and *and* were not caused by any negligence of the plaintiff, and that the said plaintiff is and has been a citizen and resident of the State of Maryland since before the happening of the said injuries, and that as a result of the said injuries the said plaintiff has been permanently disabled in his spine, his chest, his legs, and otherwise, and is wholly prevented from pursuing any occupation and has been put to a great expense as a result thereof, and under and by virtue of the provisions of said Act of Congress, an action has accrued on the part of the said plaintiff against the said defendant, and therefore he brings this suit and claims $20,000 damages.

FRANK A. PERDEW,
ALBERT A. DOUB,
Attorneys for Plaintiff.

Docket Entries.

Demurrer to amended narr. Demurrer overruled. Plea refiled, and issues joined.

Trial and verdict for plaintiff and assess the damages at $5,300; March 7, 1914.

Judgment on verdict in favor of the plaintiff for the sum of $5,300, with interest thereon from the date hereof till paid, and costs; March 10th, 1914.

14 *Order for Appeal.*

In the Circuit Court for Washington County.

No. 109, Trials, February Term, 1914.

HARVEY W. C. WHITACRE
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

Edward Oswald, Clerk:

Please enter an appeal from the judgment in the above entitled case to the Court of Appeals.

GEO. A. PEARRE,
LANE & KEEDY,
Attorneys for Defendant.

In the Circuit Court for Allegany County.

No. 109, Trials, February Term, 1914.

HARVEY W. C. WHITACRE
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

At the trial of this action in the Circuit Court for Washington County, before Hon. Martin L. Keedy, and Hon. Robert R.
15 Henderson, associate judges, and a jury, the plaintiff offered the following testimony to prove the issues joined on his part:

HARVEY W. C. WHITACRE, the plaintiff, being duly sworn, testified on his own behalf as follows:

Direct examination.

(By Mr. Doub:)

Q. What is your full name?
A. Harvey William Christopher Whitacre.
Q. Are you the plaintiff in this case?
A. Yes, sir.
Q. Where were you born?
A. Okonoko, W. Va.
Q. When?
A. August 26th, 1886.
Q. Where were you reared?
A. Okonoko, W. Va.
Q. When did you first enter into the employment of the B. & O. R. R. Co.?
A. 1894.
Q. In what capacity?

A. A section man on the track.
Q. How long did you work on the track?
A. Until August, 1909.
Q. Since August, 1909, what has been your employment?
A. Brakeman on the east end of the Cumberland Division of the Baltimore and Ohio Railroad.
Q. What is the east end of the Cumberland Division?
A. Cumberland to Brunswick is the east end of the Cumberland Division.
Q. What were your duties?
16 A. I was breaking.
Q. Did your train run from Baltimore to Cumberland?
A. From Brunswick to Cumberland.
Q. Your trains, how do they run?
A. They have two different runs—one runs to Cumbo Yards at Hedgesville and another to Brunswick.
Q. Where is Cumbo Yards?
A. At Hedgesville, in West Virginia.
Q. How old were you at the time of this accident?
A. Twenty-six years and ten months.
Q. When did the accident happen?
A. Twenty-third day of June about two A. M.
Q. Are you married?
A. I have been married.
Q. Your wife is dead?
A. Yes, sir.
Q. Tell the jury how this accident happened?
A. On the morning of the 23rd day of June, the caller came to my house about 1 A. M. and called me to go to Cumbo Yard. I left the house at 1:30 A. M. and went to the caller's office and reported. I got Engine 4153. Engineer Albright and Fireman Dyche. It had been raining and was very foggy. Then I went from the caller's office down to the engine. When I arrived at the engine I found only Fireman Dyche there. I got upon the engine and put my clothes on, and asked Fireman Dyche if he was ready to go, and he said:

(Whereupon the witness was about to state the conversation between Fireman Dyche and himself.)

To which conversation and any part thereof the defendant objected, but the Court overruled said objection and permitted the witness to state said conversation with Fireman Dyche as evidence, whereupon the defendant excepted and prays the Court to sign this its first bill of exception, which is accordingly done, this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

17 After offering the evidence set out in the aforegoing bill of exceptions, which is made a part hereof, as fully as if the same were here incorporated, the witness gave the following evidence:

A. Fireman Dyche said "No not quite." The tool boy had *had* been there and had left him no tin cup, and he asked me to go and hunt the tool boy and get a tin cup.

(Objection to any directions given him by the fireman and any conversation had with him.)

("There is no proffer to show that he was working under the directions of the fireman.")

(We [plaintiff] proffer to show that the engineer was absent and the conductor was absent, and that under the rules and regulations it was the duty of the plaintiff to act under the direction of the fireman and that he was subject to the orders of the fireman.)

To the statement by the witness of his conversation with Fireman Dyche, the defendant objected, but the Court overruled said objection, and permitted the statement of Fireman Dyche to witness to be offered in evidence, whereupon the defendant excepted and prays the Court to sign and seal this its second bill of exception, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the aforegoing bill of exceptions, which is hereby made a part hereof, as fully as if the same were here incorporated, the witness continued and gave the following evidence:

A. And put it on the engine.
Q. Who had charge of the engine at that time?

(Objection; objection sustained.)
And witness further testified:

Q. Who was there?
18 A. Fireman Dyche.
Q. Was the engineer there?
A. No, sir.
Q. Was the conductor there?
A. No, sir. The conductor did not come to the engine until we got the train at Evitts Creek about one-fourth or one-half of a mile away.
Q. Did you see the engineer before the train started? Before the engine was ready to start?
A. I did not see the engineer until I had gotten back from this pit. Until after I had fallen into this pit.
Q. Go on and tell what happened after the fireman told you what to do?
A. I told Fireman Dyche I would, and I had my lantern and took it and started to hunt the tool boy. I walked up the track a short distance and saw a light and saw it going and thought it might be the tool boy just leaving the engine. I followed the light and think I walked about twenty-five steps. The light was going due west and cut right across north and disappeared behind some-

thing, which was an engine. I could tell by holding my lantern up that it was an engine, and in order to avoid danger I walked back several steps east, and fell into this cinder pit, striking my left hip and abdomen on the rail. This pit is nine feet deep. It has nine feet of water in it. These cinders when they are dumped out of the engine into the cinder pit th-y become wet and look just like the ground.

(Objection; objection overruled; objection on the ground that it is opinion evidence; Court says "He mav state in a general way as to just what happened to him"; objection also that it involves the conclusion of the witness.)

To which answer of the witness the defendant objected, but the Court permitted the said answer of the witness to be given in evidence, whereupon the defendant excepted, and prays the Court to sign and seal this its third bill of exception, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

19 After offering the evidence set out in the aforegoing bill of exceptions, which is hereby made a part hereof as fully as if the same were here incorporated, the said question was answered and the following evidence given:

A. In the fog with one of these railroad lanterns you cannot tell it from the ground.

And the witness further testified:

Q. Do the cinders rise on top of the water?
A. Yes, sir. The cinders rise on top of the water and make it look like the ground.
Q. What is the ground covered with around the pit?
A. The ground is covered with cinders and the cinder pit and ground surrounding looks alike.
Q. Which foot went into the pit first?
A. Left foot. The last step was made with my right foot on the south side of the rail.
Q. The south rail is on the solid ground?
A. Yes, sir.
Q. What did you then do?
A. It rendered me unconscious after a while. I hung across the rail for a while, with my hands hanging down into the water, with my arms until I got my body up and pulled myself up on the rail. I then got up on the track.
Q. Then where did you go?
A. To the engine as soon as I could.
Q. How many steps from the pit to the engine?
A. Twenty-six or twenty-seven steps, I suppose.
Q. Where was the engine with reference to the dump and the coal tipple?

A. The engine was almost opposite the coal tippel on the south side.

Q. Which direction from the coal tipple? West or east?

20 A. They are almost opposite when they take coal, and it was standing at the same place as when they put coal on the track.

Q. What kind of a night was it?

A. It was a dark and foggy night. It had been raining.

Q. Is that a low place where the yard is with reference to the surrounding country?

A. Yes, sir. It is. Potomac River is there and the canal and almost one-half of a mile east Evitts Creek empties into it, making it a very low place and a place for fog.

Q. How many tracks are over that cinder pit?

A. Only two over the west cinder pit.

Q. What happened when you got back? Were you hurt?

A. Yes, sir. It made me very sick. As soon as I got out of the water I commenced vomiting and I vomited a lot of blood.

Q. Was that before you came back to the engine?

A. Yes, sir. Before I came back to the engine.

Q. What did you do before you came back to the engine?

A. I vomited blood and—(Witness is interrupted).

Q. You came back to the engine?

A. Yes, sir.

Q. Whom did you find there?

A. Engineer Albright and Fireman Dyche.

Q. Where was Albright?

A. Sitting on the seat in the engine.

Q. Was Dyche there?

A. Yes, sir.

Q. What is his name?

A. John I think.

Q. Did you tell them about the accident?

A. Yes, sir.

21 Q. Did you have any conversation with them?

A. Yes, sir. I told them of the injury.

(Objection; objection sustained.)

Q. How soon did they start?

A. They were ready to go.

Q. What did you do?

A. I went out on the pilot as all brakeman have to do.

Q. Where did you go?

A. Went to Evitts Creek and backed into the yard. There we got our orders and met Conductor Ambrose and Flagman Bohrer

Q. What kind of a train was it?

A. It was a mixed train.

(Objection as it is not important; Court says: "It may be to show whether or not it was engaged in interstate commerce.")

Q. Where did this train go?

A. Cumbo Yards.

(Objection; objection overruled, exception reserved.)

Q. Did the engine 4153 take the train to Cumbo Yard?

(Objection; objection overruled; exception reserved.)

A. Yes, sir.
Q. Where is Cumbo Yards?
A. At Hedgesville in the State of West Virginia.
Q. Was an accident report made out by the conductor?
A. Yes, sir. At Hansrote.
Q. Where is that?
A. Thirty-five miles east of Cumberland.
Q. Where did you ride on the way to Cumbo Yard?
A. On the cab on the left side.
22 Q. The engineer rode on the right side?
A. Yes, sir.
Q. Where did the fireman ride?
A. He shovels coal and he was all over the cab.
Q. Did you do any work going down?
A. Yes, sir. Some.
Q. How were you affected so far as the injury was concerned?
A. I did not feel the effects of my injury except by being sick anl vomiting blood until I got to Magnolia, but when I got off my engine at Magnolia, I had very little use of my back.
Q. Did you go to Cumbo Yard?
A. Yes, sir.
Q. Did the train go to Cumbo Yard?
A. Yes, sir.
Q. How did you come back?
A. On a passenger train.
Q. What passenger train?
A. No. 9.
Q. What was your condition?
A. I was still suffering with my hip and back on the 24th, when I went to Dr. Owens.
Q. Who is Dr. Owens?
A. He is employed by the Baltimore and Ohio Railroad Company to give first aid to the injured.
Q. How were you treated. What did you do?
A. I went home after I went to his office.
Q. Did you go to the hospital?
A. Yes, sir. In a month.
Q. Under whose treatment?
23 A. Under Dr. Owens' treatment. I went to the hospital on the 28th day of July.
Q. Was any operation performed?
A. Yes, sir.
Q. Who performed it?
A. Dr. Hawkins.
Q. What was it for?

A. Hernia.
Q. Did you have any hernia before the accident?

(Objection; objection sustained.)

Q. How was your general health prior to this injury?
A. Good. I felt good. Nothing hurt me.
Q. Do you know of any ailments?
A. No, sir.
Q. Did you have any trouble with your hip?
A. No, sir.
Q. Did you have any trouble with your lungs.
A. No, sir.
Q. How have you been affected since?
A. I have been suffering with my back, my hip and the left side of my chest.
Q. Do you know of any cause for your suffering other than this accident?
A. No, sir.
Q. How have you been suffering with your lungs?
A. I have awful pain in the left side of my lungs. I can not sleep. I also cough much.
Q. How is your back affected?
A. My back is stiff. I can not stoop.
Q. What other physicians have examined you beside Dr. Hawkins and Dr. Owens?
24 A. Dr. Koon, Dr. Johnson, Dr. Spicer and Dr. Gardner.
Q. How long did Dr. Owens treat you?
A. From the morning of the 24th of June to the 20th of December.
Q. Did he take you to the hospital again after the operation for hernia?
A. Yes, sir.
Q. What was that for?
A. He took a hot iron and burnt my back.
Q. Is that what he operated on you for?

(Objection; objection sustained.)

Q. How were you treated on that second trip to the hospital?
A. Dr. Hawkins examined me.
Q. How did he treat you?
A. He took a hot iron and burned my back.
Q. How long were you there?
A. I went there on the 13th of October and left on the 15th. Three days.
Q. Did you have any pain?

(Objection; objection sustained.)

Q Do you suffer any pain now, Mr. Whitacre?
A Yes, sir.
Q. I mean now? Do you still suffer any pain?
A. Yes, sir. Right now.

Q. How?
A. I have a great misery in my lungs and my back and also my hip when I walk around gives me lots of trouble.
Q. Are you able to do any work?
A. No, sir.
25 Q. Have you done any work since this accident?
A. No, sir.
Q. Have you been able to do any work since this accident?
A. No, sir.
Q. How do you walk?
A. I have to be assisted. I walk with a cane.
Q. Do you know anything about the use of water pails, etc., with the company?
A. Yes, sir.
Q. Have you a copy of the book of rules and regulations?
A. Yes, sir. I have a rule book.
Q. Let me see it, please. What is this book, Mr. Whitacre?
A. That is the book of rules of the Baltimore and Ohio Railroad System.
Q. Where did you get this book?
A. At the train master's office.
Q. Where?
A. At Cumberland.
Q. Train master's office of the Baltimore and Ohio Railroad?
A. Yes, sir.
Q. I see written on the book the name——

(Objection as he wants to offer certain portions of the book.)
(Mr. Doub:) I simply want to identify the book.

Q. Your name is H. W. C. Whitacre. Employed as Bkm. Was that written there when it was given to you?
A. Yes, sir.
Q. When did you get that book, Mr. Whitacre?
A. About Jan. 1, 1913.
Q. Did you have any other book afterwards?
26 A. No, sir.
Q. Was anything said to you at the time this book was given to you by the party who gave it?
A. He told me it was effective Jan. 1, 1913.
Q. Who told you that?
A. Tommy Reese.

(Mr. Doub:) I now want to offer the book in evidence.
(Objection.)
(Book is withdrawn.)

Q. Do you know whether or not these rules in that book were in force at the time of the accident?
A. I was instructed that the rules went into effect on Jan. 1, 1913.
Q. Did you have the book during that time, 1913?
A. Yes, sir.

Q. Were you given any other book during that period?
A. No, sir.
Q. Had you had any other book before that?
A. Yes, sir. That was effective in 1903, as I remember, and this book superseded the old book.

Whereupon the witness was asked the following question:

Q. Do you know what kind of supplies the company kept in its store room for the use of the engines?

To which question the defendant objected, but the Court overruled the said objection and permitted the question to be asked and the testimony be given in evidence, whereupon the defendant excepted, and prays the Court to sign this its fourth bill of exceptions, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

27 (Objection. What they kept in their store rooms has nothing to do with it.)
(Mr. Doub:) We will follow that up by showing that they put them on the engines. We just want to include this.
(What they kept in their store rooms we object to.)
(The Court:) The proffer is to continue to show what they kept in their store rooms and for the use of the engines.
(The Court:) Just name a few of the articles.
After offering the evidence set out in the aforegoing bill of exceptions, which is hereby made a part hereof, as fully as if the same were here incorporated, the said question was asked and the following evidence given:

A. Oil cans, lanterns, tin cups, etc.

And the witness further testified:

Q. Who has charge of those supplies?
A. The man at the store house.
Q. Where is the store house?
A. At the round house.
Q. In the yard?
A. Yes, sir.
Q. That is at the railroad yards?
A. Yes, sir.
Q. Were they kept there at the time of the accident?
A. Yes, sir.
Q. Who distributed those things to the engine?
A. Boys and men.
Q. When do they do that?
A. Just before the crew is called the boys place them on the engines.
Q. Just before they leave the yards?
28 A. Yes, sir.
Q. How do they supply them?

COPY BOUND C

A. They take a large bunch of one kind of articles and leave them in the yard, place them down there where he could get to them when an engine was called so that he would not have to go to the tool house every time he wanted a wrench, tin cup, etc.

(Objection to that as observations.)
(What period is he *covered.*)
(The Court:) At the time of the accident?
(Witness:) Yes, sir.

Q. When did the tool boy bring these articles down as you have suggested?
A. When did they commence that, do you mean?
Q. With reference to this accident when was the tool boy accustomed to carry those articles down?
A. At any time.
Q. Do you know whether or not they put those articles on engine 4153 on the morning of June 23rd?
A. What articles?

Whereupon the following question was asked:

Q. Those is question?

To which question the defendant objected, but the Court overruled the said objection, and permitted the question to be asked, and the testimony to be given in evidence, whereupon the defendant excepted, and prays the Court to sign this its fifth bill of exceptions, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

29 After offering the evidence set out in the aforegoing bill of exceptions, which is hereby made a part hereof, as fully as if the same were here incorporated, the said question was asked and the following evidence given:

(The Court suggests that the question of the tin cup be argued now.)

And the witness further testified:

Q. At what time in the morning did this accident occur?
A. A little after two A. M.
Q. What time were you called?
A. The caller was at my house at one A. M.
Q. What time were you called?
A. Two A. M.
Q. What kind of a brakeman were you?
A. Front brakeman.
Q. Where was the place of front brakeman?
A. At the front of the train. At the head of the engine.
Q. Mr. Whitacre, have you described as carefully as you can the place where this accident occurred?
A. Yes, sir.
Q. Would you be able to identify this picture? Look at these and say what they are? (Witness is shown pictures.)

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A. Yes, sir. That is a picture of the cinder pit.
Q. At what time?
A. As it was at the time I was injured.
Q. Look at this one.
A. Yes, sir. That is a picture of the same place.
Q. That is a fair representation of the cinder pit? A definit
view?

A. Yes, sir.

30 Q. State whether or not that fairly represents it as it wa
at the time of the accident?

A. (None given.) (No objection to admitting that.)
Q. Will you take this photograph and explain to the jury whe
the water is located that you spoke about?
A. It is all water from this rail (indicating).

(The witness is now speaking of plaintiff's photograph marke
August 13, No. 2.")

This is a track and there is a track over there and the water
from the first rail of this track to the farthest rail of the other trac
under the two tracks.
Q. What supports the rail over that water?
A. In here? (indicating.)
Q. Yes?
A. They have concrete post in there. They support the rail.
Q. Where was the engine standing with reference to some objec
A. This is the view of the left side of the coal pit. This pictu
was taken on the south side. (That is plaintiff's Exhibit Pictu
No. 2.) My engine was standing almost opposite the coal pit.
Q. You say this track (indicating). What does that mean?
A. This track right here?
Q. The first track south of the coal pit and south of the cind
pit?
A. Yes sir. South of the cinder pit.
Q. What is this track here (indicating)?
A. That is the fire track. That is water there.
Q. Is the train of cars over the cinder pit?
A. Yes, sir.
Q. What train of cars?

A. The train of cars shown in the picture.

31 Q. Is the south rail shown in the picture over the cind
pit or on the solid ground?

A. That is the south rail.
Q. Yes, sir. Shown over the cinder pit?
A. It is on the concrete wall of the cinder pit.
Q. Then the cinder pit is over the rail?
A. Yes, sir.
Q. You walked back twenty-five steps from the engine and stepp
into the cinder pit?
A. Yes, sir. My engine was down here (indicating) on the fi
track opposite the coal pit.
Q. How long is this cinder pit?
A. 150 feet to the best of my judgment.

COPY BOUND

(Mr. Doub:) 180 feet is correct.
(Witness is now shown Plaintiff's Exhibit Picture No. 1.)

Q. That is picture of what?
A. Of the cinder pit.
Q. What are those tracks south of the scaffold? Are those the ready tracks?
A. Yes, sir.
Q. Where was your engine standing as shown by this picture?
A. This is part of the cinder pit over here and the engine was on this track standing down here (indicating).
Q. As I understand you, you started west from the engine and then turned north and walked into the cinder pit?
A. Yes, sir. I walked up here and saw this light and I followed it up here (indicating), and walked about twenty-five steps and the light turned north and I walked into the cinder pit.
Q. Did you see the cinder pit?
A. No sir. I did not see the cinder pit.
32 Q. How far apart are these up-rights?
A. About eighteen feet.
Q. What is this shown in the picture? That bar by the up-rights. That is what is called a strut is it not?
A. Yes, sir.

(It is admitted that pictures were taken as of the dates shown on the back of the pictures.)
(All pictures produced in the other trial are admitted here.)
(Mr. Doub:) We do not admit that your pictures were taken to show the lights as they were.

Q. Mr. Whitacre, take your coat off. (Witness removes coat.) Show the jury your hip. Which hip was hurt?
A. My left hip. (Jury feels his hip as witness steps.)
Q. Will you state to the jury whether any lights were burning that night?
A. No, sir; there was not.
Q. What happens to your hip when you walk?
A. Well, it gives way. Apparently flies out of place.
Q. How is your back? Any external injury to your back?
A. There is no injury on the outside. Apparently my back is sunk in.
Q. How frequently do engines pass out on the south side of the pit?
A. That is according to how much hauling they have to do. I have known them to go out as close as fifty minutes apart, frequently.
Q. All their trains pulled up there?
A. The trains have to pass, but they pass north over in the yard further.
Q. State whether the company supplies drinking water for these engines as well as cups?
A. Yes, sir.
33 Q. Do you know whether the Baltimore and Ohio Railroad Company had had any trouble with the movement of its

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trains because of their failure to supply water and cups to its employees before the accident on this division?

(Objection; we do not think that any regulation or custom can be proven in that way.)

(Mr. Doub:) We will show that they could not get men to come out because of no water and cups.

(Mr. Doub:) We will strike out water and just say cups.

(Objection.)

(Question is then changed to read:)

Q. Will you state to the jury whether to your knowledge the company previous to this accident on this division had difficulty in the movement of its trains because of its failure to supply engines with drinking cups?

(Objection; objection sustained.)

Whereupon the witness was asked the following question:

Q. State to the jury whether drinking cups were supplies used on the engines on this division prior to the accident?

To which question the defendant objected, but the Court overruled said objection, and permitted the question to be asked and the testimony to be given in evidence, whereupon the defendant excepted, and prays the Court to sign this its sixth bill of exception, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the foregoing bill of exceptions, which is hereby made a part hereof, as fully as if the same were here incorporated, the said question was asked and the following evidence given:

A. Yes sir.

And the witness further testified:

Q. For what were the cups used?

34 A. For drinking water.

Q. By whom were they used?

A. The crew.

Q. Who made up the crew?

A. The engineer, fireman and head brakeman use the one on the engine.

Q. Do you know how far it is from Cumberland or its yards down to Cumbo yard?

A. 72 miles, I think.

Q. How long does it take to make that run with this train?

A. Generally about eight hours.

Q. What time did this train get to Cumbo Yard?

A. We were relieved at eleven or eleven fifty five. I am not sure.

Q. Where?

A. At Cumbo Yard.

COPY BOUND

Q. What time did the crew arrive at Cumbo Yard with the train?
A. About 10:36, we passed Hedgesville, the last telegraph office.
Q. Then you arrived at Cumbo Yard between 10:36 and 11 o'clock?
A. I don't know just when we pulled into the yard.
Q. Who shoveled coal into the engine on this trip?
A. Fireman Dyche.
Q. What wages did you receive from the Baltimore and Ohio Railroad Company?
A. $2.42 for ten hours when I was breaking on the head of the train.
Q. How much per month?
A. I averaged about $65.00 per month.
35 Q. Did you have regular employment?
A. Yes, sir.
Q. How near promotion were you?

(Objection.)
(Mr. Doub:) I do not know what his answer will be, but I would like to know whether he was ready for promotion.
(The Court:) If there was a rule upon the subject that would be admissible.
(Objection sustained.)

Q. Was there a practice in reference to promotion?
A. Yes, sir.
Q. What was the practice?
A. What practice are you speaking of?
Q. How do you know that you were about to be promoted?

(Objection; objection sustained.)

Q. What was the practice in regard to promotion?

(Objection on the ground that we think there would be a rule on the subject; objection sustained.)

Q. Do you know whether there was a rule in regard to promotions?
A. Yes, sir. In the rule book.
Q. State what the practice and the rule were?

(Objection.)

Q. Will you turn to the rule book and show it to us?
A. If I can find it. I think you will find it on page 1.

(Witness examines rule book.)

Q. Is that the only rule you know of?
A. That is the only one I can find.
Q. State what the practice is?

(Objection; objection sustained.)

36 Q. Had you been promoted above the position of brakeman before the accident?

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A. Yes, sir. Extra flagman.
Q. Is that a better position than brakeman?
A. Yes, sir. It pays $2.52 for ten hours.
Q. How much does brakeman pay?
A. $2.42.
Q. When were you promoted?
A. I became flagman about the first of 1911.
Q. That is extra flagman?
A. Yes, sir.
Q. When should you have become a regular flagman?
(The Court:) You were a brakeman at the time of this injury?
(Witness:) Yes, sir.
Q. Then you were promoted to extra flagman?

(Objection; objection sustained.)

Whereupon the following question was asked:

Q. How were you promoted?

To which question the defendant objected, but the Court overruled the said objection, and permitted the question to be asked and the testimony to be given in evidence, whereupon the defendant excepted, and pravs the Court to sign this its seventh bill of exceptions, which is accordingly done this 1st dav of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the aforegaing bill of exceptions, which is hereby made a part hereof, as fully as if the same were here incorporated, the said question was asked and the following evidence given:

37 A. I was promoted as flagman. As soon as they are capable of taking care of a train they promote us to flagman, but that does not relieve us from breaking.

And the witness further testified:

Q. What is the difference between flagman and extra flagman?
A. Well, an extra flagman does not have a regular flag.
Q. After being promoted to flagman, what is the next promotion?

(Objection; objection sustained.)

Cross-examination:

(By Col. Pearre:)

Q. You say you were twenty-six years old when the accident happened?
A. Yes, sir. Twenty-six years and ten months.
Q. Mr. Whitacre, how long had you been employed by the Baltimore and Ohio Railroad Company when the accident occurred?
A. Altogether, you mean?
Q. Yes sir?
A. Over nine years.

Q. How long had you been acting as brakeman in and out of Cumberland?
A. Since 1905 I was employed as brakeman.
Q. Did you know the location of the cinder pit at the time of this accident?
A. Yes, sir; I had seen it.
Q. How many times had you seen it?
A. I do not remember.
Q. Ten times?
A. You asked me in Cumberland, and I told you about 20 times, and I now say the same thing, about 20 times?
38 Q. Was it 30 times?
A. No, sir.
Q. Then you say it was not more than twenty times?
A. Yes, sir.
Q. Between what dates?
A. I have no dates.
Q. You know when it was constructed?
A. The cinder pit was in service January in 1913.
Q. You were injured when?
A. June 23, 1913.
Q. You say you saw it not more than twenty times?
A. Yes, sir.
Q. How many times were you there?
A. I was there the night I was injured.
Q. Has your attention been called to it since the night you were there?
A. No, sir.
Q. Were you shown these time tickets?
A. These are time cards of the Baltimore and Ohio Railroad.

(Witness examines the tickets.)

Q. What are they used for?
A. They are used for reporting the time employees make in the train service.

(Objection.)
(Mr. Pearre:) We expect to prove that these cards have on them the time this man was called, to this cinder pit for service. I want to refresh his recollection and see if he can then say when he was there.
(Objection overruled.)
(It is admitted.)

39 Q. Have you looked them over, Mr. Whitacre?
A. Yes, sir.
Q. Since you have looked them over have you any clearer idea how often you were there?
A. I have no recollection. I do not know what these time cards are for.
Q. After looking at the time cards can you say whether you were there? Can you say now that you were not there more than once?
A. I can not remember. That is all I *say* say.

Q. Do you know who makes out these time cards?
A. Yes, sir.
Q. Who?
A. The conductor of the crew.
Q. From whom does he get his information?

(The Court:) Objections to this.

Q. You said something about this cinder pit having tracks on both sides of it.
A. Yes, sir.
Q. What is on the north side of it?
A. The hump.
Q. What is the hump used for?
A. Put coal into the coal tipple.
Q. What do they put on the tracks on the hump?
A. The hump is a raised place on the track and they run cars of coal over them to the coal tipple.
Q. How far is it raised?
A. Three or four feet.
Q. What is north of the hump?
A. More tracks.
40 Q. What is south of the hump?
A. Cinder pit.
Q. What is south of the cinder pit?
A. Tracks.
Q. How many?
A. Three.
Q. What is the first track south of the cinder pit used for?
A. Ready track.
Q. Is not that the track that is used for engines going under the coal tippel to have coal put down. The first track south of the cinder pit and comes to the south of the cinder pit?
A. Yes, sir. I believe it is.
Q. The first track south of the cinder pit is the track on which the engines go with their tanks to be loaded with coal from the coal tipple? What is south of that?
A. They load the engines from the coal tipple, too.
Q. What is south of that?
A. The ready track.
Q. How many?
A. Two.
Q. What are these ready tracks used for?
A. For getting engines ready to leave the yard.
Q. Who are employed about there in connection with these engines on the ready track? The train crews?
A. Do you mean when the train crew is called?
Q. Yes?
A. The hostlers have charge of them until the train crew gets them.
Q. What are the hostlers?
A. They are men employed in the yard to look after the engines,

et the fire up and look after them until they are recalled to leave the yard.

1 Q. What duties have the hostlers with reference to placing the engines on the ready track?

A. The hostlers employed around there in connection with these ngines coal them and put them on the ready track and the train-nen get them to go on the train.

Q. Who get them from the ready track?

A. The fireman and engineer.

Q. Then they are the only men employed around there?

A. Do you mean employed at that point?

Q. Yes?

A. They have tool boys employed and have men working at the oal tipple and have men stationed there to take numbers and times f the engines leaving there.

Q. How many men have they working around the coal tipple?

A. I do not know. I never asked.

Q. Where is the coal tipple?

A. I cannot tell how far east of the cinder pit. The coal tipple s east of where I was injured.

Q. You have passed through there?

A. Yes, sir. I have got my engine on the ready track.

Q. You say the pit is nine feet deep?

A. Yes, sir.

Q. You said it was nine feet deep?

A. Yes, sir.

Q. How do you know that?

A. I boarded with a man that helped to build it.

Q. You know then a great deal about it?

A. Yes, sir.

Q. You said how long it was. What is the distance from the east end of the cinder pit to the west end of the coal tipple?

42 A. I do not know.

Q. Can not you approximate it?

A. No, sir.

Q. You can not give an idea of the distance between the east end of the cinder pit and the west end of the coal tipple?

A. No, sir.

Q. Where were you living then?

A. 206 West Third St., South Cumberland.

Q. How did you get down there?

A. I came out Springdale St., and down the railroad to the caller's office and down the track from the caller's office to the engine.

Q. Did you have any light with you?

A. My lantern.

Q. Was it lighted?

A. Yes, sir.

Q. What kind was it?

A. A regular Baltimore and Ohio Railroad lantern.

Q. Did it give you sufficient light?

A. It gave me light enough to prevent me from falling over anything.

Q. You came down Springdale St. to the crossing?

A. Yes, sir.

Q. You walked east on the railroad?

A. Yes, sir.

Q. How far is it between Springdale St. and Virginia Ave.?

A. One block.

Q. Did you walk on the track or between the tracks?

A. Beside of the track. There was a road there.

43 Q. What do you mean by a road?

A. A track along the side.

Q. Do you mean a road?

A. It is used for both. It is six or eight feet wide.

Q. Did you walk between the tracks?

A. No, sir; to the left of them.

Q. Where did you cross the tracks?

A. At Virginia Ave. I walked down the tracks from Virginia Ave. to the caller's office.

Q. When you got to Virginia Ave., where did you go?

A. I crossed a portion of the tracks at Virginia Ave., but walked down there to the caller's office.

Q. Did you not go down Virginia Ave., and go to the gate?

A. No, sir.

Q. Did you not testify that you went down Virginia Ave., and went into the gate?

A. I told them just what I now tell you. I went down Third St. to Springdale St., and Virginia Ave., to the caller's office.

Q. When did you leave the main tracks of the Baltimore and Ohio?

A. At Virginia Ave.

Q. Then where did you walk?

A. On the yard tracks.

Q. How did you get into the yard? Did you pass through the gate?

A. There was no gate there.

Q. Is there not a gate there?

A. No, sir. None west of Virginia Ave. crossing.

Q. I am talking about east of Virginia Ave. crossing. You were going west and then you went east and then southeast of Virginia Ave.?

44 A. Yes, sir.

Q. Did you walk down through the yard to the caller's office?

A. Yes, sir.

Q. What did you pass going down through the yard to the caller's office from the railroad after you left the main tracks of the Baltimore and Ohio?

A. I do not remember what I passed that night.

Q. You go by there often, don't you?

A. I have not been there since I was injured.

Q. You went by there before?
A. Yes, sir.
Q. You knew what things were in the way?
A. There were several things in the way, I had to go slow down there to keep from running into things.
Q. Did you run into anything?
A. Not to injure me.
Q. Did you run into anything?
A. I had my lantern.
Q. Did your lantern give you sufficient light?
A. Yes, sir. It kept me from falling over anything large. Any large obstruction.
Q. Did you pass a dry tank?
A. Yes, sir.
Q. Did you see it?
A. No, sir. I did not see it, but I knew it was there.
Q. You knew it was there just as you had seen the cinder pit?
A. Yes, sir. I knew it much better than the cinder pit, because it was in operation much longer.
Q. Every time you went down and saw the crane and that iron structure you saw the tank?
45 A. If I went that way.
Q. When you did not go that way, which way did you go?
A. It was only a short time, within the last six months that I went down through the yard a little to the south of the main tracks to the yard office.
Q. How far from this direction? How far east or west of this object which you are now describing?
A. It would be as much as ten or twelve tracks at least in the yard.
Q. Where would you strike these yard tracks?
A. At the Virginia Ave. crossing.
Q. In going down that way what obstructions do you pass in the way of switches, tracks and other things?
A. Yes, sir. Pass several switches.
Q. Have you walked over several tracks?
A. Yes, sir.
Q. A number of obstacles there?
A. Yes, sir.
Q. Did you have any trouble that night going down?
A. No, sir.
Q. Do you know any other way of going down there? The way just opposite the Y. M. C. A. Building?
A. Yes, sir. I know that way.
Q. Is that not a better way?
A. No, sir.
Q. You do not walk over any tracks between the Virginia Ave. crossing and the gate do you?
A. I do not see any tracks on the street. (Witness laughs.)
Q. Answer my question. Do not become amused.
A. No, sir; I do not see any railroad tracks on the street.
46 Q. How many were inside the gate that you walked over?
A. One right inside the gate.

Q. How many tracks do you walk over when you go down t other way?
A. A number of them.
Q. So I understand that you went down that way instead of goi down Virginia Ave., where there was no tracks. You went do that way where there were many tracks?
A. Yes, sir.
Q. And you had a lantern to see and had to walk carefully?
A. Yes, sir.
Q. And if you would not have walked carefully you might ha been injured?
A. Yes, sir.
Q. You walked carefully until you got down to the caller's offic
A. Yes, sir.
Q. How did you know when you got down to the round house?
A. I knew it when I got to it.
Q. Did you say that it was foggy?
A. Yes, sir.
Q. How did you see the round house?
A. I knew the location and I knew where it was.
Q. You knew the location of the cinder pit?
A. No, sir.
Q. Do you mean to tell the jury that you did not know the lo tion of that cinder pit when you went by there twenty times?
A. Yes, sir; I did not.
Q. You knew the location of the cinder pit in the day time, d you not?
47 A. Not very good, I did not.
Q. Did you know it?
A. I knew there was a cinder pit there some place.
Q. Did you know where it was with reference to the ready tra in the day time?
A. I did not until I was injured.
Q. You had seen it twenty times?
A. I said probably I had seen it twenty times.
Q. Tell the jury how many times you have seen the cinder pit the day time?

(The Court:) I think he has answered that.

Q. How many times have you gone out as head brakeman in t night since that cinder pit has been in operation?
A. I do not remember. I do not remember how many time have gone out of there in the night.
Q. How many times have you gone out there in the day time?
A. I do not know exactly.
Q. Can you approximate it, from the ready tracks?
A. If I have been past there twenty times I have broke twe turns out of there. But I would not take an oath that I was p that place twenty times.
Q. Tell the jury how many times you took an engine off of t ready track after that cinder pit was put in operation?

A. I can not tell you without my book. I have been so unlucky to have lost the book.
Q. Why do you say so unlucky?
A. Because I have lost it.
Q. Have you read your testimony over since the last time you testified?
A. No, sir.
Q. You say you have not? I mean the stenographer's notes?

(Witness hesitates.)

48 Q. Why do you hesitate?
A. Why is it necessary to know that?
Q. Answer the question?
A. I read the printed stenographer's report.
Q. Why did you say you had not read it over when I asked you at first?
A. I did not understand what you meant.
Q. You heard me ask the question as to whether or not you read over the stenographer's notes. Did you not know what I meant?
A. I did not understand it that way, Mr. Pearre.
Q. Now, Mr. Whitacre, you went down as far as the caller's office. The caller's office is near the round house?
A. Yes, sir.
Q. How did you happen to see the round house when you got there?
A. I knew where it was.
Q. You knew where it was because you had been there before, is that right?
A. Yes, sir.
Q. Then you went into the door of the caller's office?
A. Yes, sir.
Q. Which door?
A. The door from the north side.
Q. Which door did you go out of?
A. As near as I can remember I went out of the south door.
Q. That is almost directly opposite the north door?
A. Yes, sir.
Q. In the caller's office you go up several steps and there is a screen and a man behind that?
49 A. Yes, sir.
Q. Who stands in there?
A. At the second door is the caller's department.
Q. Then you went up to the second door and went into the caller's office? (door or floor.)
A. Yes, sir.
Q. What did you do there?
A. I reported.
Q. Ready for work?
A. Yes, sir.
Q. Then where did you go?
A. To the engine.

Q. Did you have your lantern with you?
A. Yes, sir.
Q. Why did you not say in your direct examination that you had your lantern?
A. I think that was brought in.
Q. Did you have your lantern lighted when you went out of the south door of the caller's office?
A. Yes, sir.
Q. Then where did you go?
A. Down the track to the engine.
Q. What was the condition of the night?
A. It was dark and foggy and very damp.
Q. Will you take the photograph, Mr. Whitacre, and get your bearings and give us an idea of what it is and state if that is a fair representation of the various structures around there?

(Witness is shown photograph.)

A. Those lights were not there.
Q. I am not going to ask you anything about the lights. Which lights are you speaking about?
50 A. You asked me about the representation.
Q. Is it a fair representation of the location?
A. Yes, sir, leaving the lights off.
Q. Look at this photograph and see if that is a fair representation of the location leaving out the question of lights?

(Witness is shown photograph.)

A. Yes, sir; I think so. Of course, I do not mean to say that these cars and engines were around there at that time.

(Witness is now shown photograph marked "Defendant No. 7," and says that it is a fair representation of the relative location of the permanent structures and the equipment about there at that time, outside of the lights.)

Q. Mr. Whitacre, look at photograph marked "Defendant No. 7," and state if you know what the iron structure which appears on the right side of that photograph is?
A. That is the structure where the crane runs on over the cinder pit.
Q. Can you see any portion of the cinder pit there?
A. Yes, sir.
Q. You see, do you not, the first track of the cinder pit on the north side of that iron structure as shown in that photograph?
A. Yes, sir.
Q. How deep is that ash pit there?

(Objection.)
Mr. Pearre: He went over this.
(Question changed.)

Q. What is the depth of the cinder pit on the right hand side of the track—the first cinder pit looking from the south towards the north?

A. That is about nine feet.

Q. I mean the first track west of the structure. Is that not four feet and does it not incline down like that to nine feet?

51 A. That is not the way I was instructed and I never saw it empty. All that I know is what the fellow told me.

Q. Did you see it empty before it was completed?

A. No, sir.

Q. Were you not by there after it had proceeded to that part of construction where it was walled up inside?

A. No, sir. Not that I remember.

Q. Mr. Whitacre, show the jury on this photograph marked "Defendant No. 7" just how you came out of the door of the caller's office and then what course you came down to where your engine was. You came out of the south door, I believe, of the caller's office and then where did you go?

A. Right down this track here (indicating). The south leg of the old "Y."

Q. Do you mean the first track as shown on the photograph crossing around the hump?

A. No, sir.

Q. What do you mean?

A. You can not see the track very good there. It comes up here and goes back there.

Q. Can not you show it with reference to the location of those houses where the track runs?

A. I went down the south leg of the old "Y" and came down this track.

Q. Now which way did the south leg of the old "Y" run from the caller's office?

A. Say this is the south leg of the old "Y" and this the caller's office; the south leg of the old "Y" runs right down here (indicating.)

Q. Show the jury just where the south leg of the old "Y" ran with reference to these obstructions. Which way did the south leg of the old "Y" run with reference to the south door of the caller's office?

A. It ran southeast of the caller's office.

52 Q. Is it there now?

A. I do not know.

Q. When were you there?

A. Not since I was injured.

Q. Can you tell from this picture the general direction you took from the south door of the caller's office down to the ready track?

A. I told you I went down the south leg of the old "Y" to this track which runs out here to a switch. I made sure of myself when I got there, as it was very foggy, and then I went down here to the ready track.

Q. Which track did you go down?

A. This track here.

Q. You walked down then on the track south on the west end as shown on the photograph marked "Defendant No. 7"?

A. Yes, sir.
Q. Now where was your engine standing?
A. My engine was standing on this track (indicating).
Q. Now which track was that with reference to the cinder pit?
A. It is the second one south of the coal tipple.
Q. Then on which side of your engine did you go down?
A. Down the track to the rear end of the tank.
Q. Down this track, the farthest one?
A. Yes, sir. I came down that track and walked over on the l
hand side and climbed upon the engine.
Q. Did you have your lantern with you?
A. Yes, sir.
Q. Was it burning all right?
A. Yes, sir.
Q. Did you have any trouble getting down the track from
caller's office?
53 A. No, sir. I do not remember that I had any trouble.
Q. Why did you take that track?
A. Because I knew that track led down to the ready track.
Q. You knew that track led away from the cinder pit, did
not?
A. A man is not apt to be thinking about all at once. I kn
the ready track was not on the cinder pit.
Q. Was that not the reason you took that track?
A. No, sir. I knew that track led to the engine.
Q. Did you not say awhile ago that you took that track beca
you knew it was safe?
A. Yes, sir; and I say it again. I knew it was safe.
Q. There are many tracks there?
A. Yes, sir.
Q. How did you know that track?
A. Because I knew from the switches what tracks I go to.
Q. You knew how the tracks ran?
A. Yes, sir.
Q. You knew how the tracks lay with reference to the cinder
and this track on which the train moved?
A. Do you mean that track south?
Q. Yes, sir. You knew where that ran with reference to
cinder pit, did you not?
A. Yes, sir. I knew that was the ready track.
Q. You knew that that track was below the cinder pit, did
not?
A. I knew that track was south of the cinder pit.
Q. Then you knew where the cinder pit was?
A. I said that I had passed the cinder pit, but had not exami
it to know just where it was.
Q. Did you have to examine it to know where it was with re
ence to the ready track?
54 A. No, sir.
Q. You said your engine was about opposite to the
tipple?

A. Yes, sir.
Q. Just south of the coal tipple?
A. Yes, sir. Almost opposite just south of it. The tender was right under that coal chute almost south of the coal tipple on the ready track.
Q. Now which track is that?
A. Here is the one that comes under the coal tipple (indicating).
Q. Which track comes under the coal tipple on which the tanks are run?
A. That track (indicating).
Q. Your engine was not on that track, was it?
A. Yes, sir. On the first track south of the coal tipple.
Q. That would not put it under the coal tipple, would it?
A. Well, it was under the coal chute.
Q. Then it was not under the coal tipple?
A. It was almost opposite the coal tipple so as to coal the tank.
Q. Now, as a matter of fact, was it not some fifteen or twenty feet west of the coal tipple?
A. No, sir, it was not.
Q. Now you put your dinner bucket on the engine?
A. Yes, sir.
Q. Who was there?
A. Fireman Dyche.
Q. Anybody else?
A. I did not see anybody else.
Q. Did you look around for anybody else?
55 A. I looked around, but I did not see anybody.
Q. Did you look on the engineer's side for the engineer?
A. Yes, sir. I looked for him. It is only nine feet across there, and nothing to obstruct the view.
Q. Did you ask the fireman where the engineer was?
A. I do not remember.
Q. You say there was nothing to obstruct your view from one side of the engine to the other. Have you not testified that it was foggy?
A. The engineer and fireman have torches.
Q. Did the engineer have a torch?
A. The engineer was not there. There is a place on the engine, a shelf, where the engineer places his torch.
Q. Where was Dyche?
A. He was on the other side of the engine.
Q. How far was the torch away?
A. Four feet.
Q. The light of the torch would project four feet?
A. Yes, sir.
Q. Did you look around the engine to see if anybody else was there?
A. I did not.
Q. Did you get off of the engine?
A. No, sir.
Q. Did you have your lantern with you?

A. Yes, sir.
Q. On your way down from the caller's office did you not have to pass the west end of the cinder pit?
A. Yes, sir.
Q. Did you go into it then?
56 A. No, sir.
Q. Was there anything to keep you from going into it then?
A. No, sir. If I would have kept on going down, I might have gone into it.
Q. You went to the right of it?
A. Yes, sir. I certainly did.
Q. What is the distance between the east end of the cinder pit and the west end of the coal tipple?
A. I do not know.
Q. Can you give an idea?
A. No, sir.
Q. Is it the length of an engine?
A. I do not know.
Q. Can you give an idea?
A. No, sir.
Q. Is it the length of an engine?
A. I do not know.
Q. You were here and walked back west (indicating)?
A. Yes, sir.
Q. How many feet?
A. About twenty-five steps.
Q. How many feet?
A. About seventy-five feet.
Q. Were you in a hurry?
A. Yes, sir. I was in a hurry looking for the tool boy simply because the fireman told me——

(Col. Pearre:) We object to have the witness injecting that into every answer he gives.

Q. Were you in a hurry?
A. Yes, sir.
57 Q. To overtake the boy?
A. Yes, sir.
Q. Were you running or walking?
A. I was walking as fast as I could in the fog.
Q. You saw a light, you say?
A. Yes, sir.
Q. How far ahead was it?
A. Not very far, because I could not see a light very far in the fog.
Q. Could you overtake the light?
A. No, sir.
Q. Did you see anybody carrying the light?
A. No, sir. I could not tell what it was, but it looked as though it might have been a torch.

Q. With that torch could you not have seen these structures?
A. No, sir.
Q. How high are they?
A. I do not know.
A. About?
A. Twenty or thirty feet.
Q. They are pretty substantial, are they not?
A. Yes, sir.
Q. You could not see the structures that night with the lantern
your hand.
A. No, sir, I could not see them.
Q. And with a torch you could not see them?
A. No, sir.
Q. So with your lantern and the light of the torch you did not
e that structure?
A. No, sir, I did not.
Q. You knew the structure covered the cinder pit, did you not?
A. I did not know.
Q. If you had seen it, you knew that the cinder pit was there?
A. I knew they use the traveling crane and like of that.
Q. Mr. Whitacre, do you know what is below the traveling crane
spended below it?
A. There is a little watch box there for the operator, the engineer
f the traveling crane.
Q. The engineer of the traveling crane is in that box?
A. Yes, sir. That is where he stays.
Q. Do you know the four lights?
A. They were not there that night.
Q. Were they not burning that night?
A. No, sir. They only burn when the crane is in operation.
Q. Do you know that they were there that night?
A. No, sir.
Q. Do you know they were on a different circuit from the arc
ghts?
A. Yes, sir. But there were no lights there that night.
Q. Now you walked back twenty-five steps from your engine
hich was opposite the coal tipple?
A. Almost opposite; yes, sir.
Q. The tank of the engine would come right under the coal
pple?
A. Yes, sir.
Q. You would have to walk west going back along the track?
A. Yes, sir.
Q. How far did you walk back?
A. I walked up here a short distance and saw this light ahead of me, and it turned north and disappeared behind
omething.
Q. Did you follow it behind something?
A. Yes, sir. I saw it was an engine. I held my lantern up and
aw it was an engine.

Q. You were holding your light down and when you saw the engine you threw your light up and saw that it was an engine?
A. Yes, sir.
Q. Then you saw the cinder pit?
A. No, sir.
Q. Do you know that the light ashes only stay on top of the cinder pit?
A. No, sir. It all looks alike.
Q. Do you not know that the dark ashes sink and the light ashes stay on top?
A. I do not.
Q. You say you put your right foot on the track?
A. Yes, sir.
Q. How do you know that?
A. I first walked west twenty-five steps and then turned to the right and walked a couple of steps to the east. I then walked right along the cylinder of the engine, right behind of the pilot, and walked a couple of steps east of the pilot.
Q. Where did you fall in?
A. Right in front of the pilot.
Q. Were there any lights around there?
A. No, sir.
Q. Anybody else?
A. Fireman Dyche.
Q. Anybody else?
60 A. Well, there was a fellow went by while I was vomiting blood.
Q. Why did you not call that man?
A. Well, I was sick and was vomiting, and I did not think of assistance.
Q. Well, the reason you did not call to this man was because you were vomiting, is that right?
A. No, sir, I did not think of calling him.
Q. When you fell into this pit you say you became unconscious?
A. Yes, sir.
Q. Where was your lantern?
A. On my left arm.
Q. Did your lantern break?
A. No, sir.
Q. Did it go out?
A. Yes, sir.
Q. Where was your time book?
A. It fell out of my pocket.
Q. Were you head down or feet down when you fell?
A. I do — know what position I was in when I was unconscious.
Q. Well, you just stepped into the pit?
A. Yes, sir.
Q. Did you look for your time book?
A. No, sir.
Q. Did you look for your time book?
A. No, sir.
Q. Did you not destroy your time book?

A. No, sir. I did not. I also lost my keys and a gold watch in that cinder pit that night, if you think I destroyed my time book.

Q. You left home at 1:30?

A. Yes, sir.

Q. Called for what time?

A. Two o'clock.

Q. What time did your engine leave the ready track for the yard low?

A. I do not know.

Q. What time was it scheduled to leave?

A. Two o'clock.

Q. What time was it when you first came to the engine before u got hurt?

A. A couple of minutes of two o'clock. I put on my clothes and oked at my watch and it was a minute or two after two, and I ked Fireman Dyche whether he was ready.

Q. Do you know whether or not your engine left on time?

A. It did not.

Q. How late was it?

A. I do not know.

Q. How do you know it was late, then?

A. Because it was after two o'clock when I looked at my watch.

Q. Do you know what time the engine left after you got out of e cinder pit?

A. No, sir.

Q. How long after you became conscious was it before you got ck to the engine?

A. I do not know, but it was a right smart little bit.

Q. Can you give us any idea?

A. I do not know exactly. It might have been eight or ten minutes. I have an idea I was eight or ten minutes getting the twenty-five steps?

Q. Did you call anybody?

A. No, sir.

Q. You were going back by yourself?

A. Yes, sir. I was hunting my way when that man passed me.

Q. Did you have any light when you got out of the pit?

A. No, sir.

Q. How did you get back?

A. I hunted my way back in the dark.

Q. Did you have any trouble?

A. Yes, sir.

Q. Did you fall into the pit?

A. No, sir.

Q. Tell the jury how you got out of that pit and back to the ngine on a night so dark as that without any light?

A. I said when I got out of the cinder pit I was very sick and it ade me sick, and I started to vomit, and some man passed me ith a torch. I am sorry that I did not ask him who he was. He eld his torch up and went on.

Q. Did he stop?

A. No, sir.
Q. He knew you were sick?
A. Yes, sir; I guess. He looked like an Italian.
Q. How do you know he looked like an Italian?
A. Because he held his torch up at my face and looked at me.
Q. He held his torch at your face and not at his and yet you say he was an Italian?
A. Yes, sir. And I say our faces were only about eighteen inches or two feet apart.
63 Q. Do you know, Mr. Whitacre, which end of the cinder pit you fell into?
A. Not into the end at all.
Q. Was it in the midle?
A. No, sir; it was the outside.
Q. Was it near the middle or the end?
A. I do not know.
Q. Do you know Jimmy Spearman?
A. Yes, sir. I have seen him.
Q. How long have you known him?
A. Not long, but I did see him in December.
Q. Where did you see him?
A. At his house.
Q. What did you say to him?
A. I went out there to see if Mr. Spearman had fallen into the pit.
Q. Did you not tell Mr. Spearman how you come to fall into that pit?
A. No, sir.
Q. Did you not tell Mr. Spearman that you walked around the east end of the cinder pit until you came to the north side of it, that you went between the iron structure on the north side and an engine and tank that were standing there on the north track of the cinder pit and when you came back you thought that you had reached the end of the cinder pit and you went directly behind the tank of the engine and without thinking stepped into the cinder pit?
A. No, sir.
Q. And did not Mr. Spearman tell you that he could not see how you fell into the cinder pit because he said there was an arc light burning over where you fell in that night?
A. There was only about five minutes' conversation between me and Mr. Spearman. He was getting ready to go to work
64 and I asked him whether he was the man that fell into the cinder pit and he said "No," that he jumped into the cinder pit.
Q. Could not that have been said in five minutes?
A. Not, sir. Not to a stranger.
Q. Did he not tell you that he could not see how you could have fallen in on account of the arc light?
A. No, sir. Nothing was said about that.
Q. Nothing at his home or anywhere else?
A. No, sir. That is the only time I spoke to Mr. Spearman, except at the Allegany Court House.

Q. Was there not a tin cup on the engine that you went to?
A. I do not know.
Q. Was there not a tin cup on the engine that you went out on?
A. I do not know.
Q. Then you went out without a tin cup?
A. I do not know whether Fireman Dyche got one or no.
Q. Fireman Dyche was shovelling coal that night?
A. Yes, sir.
Q. Do you not know that men usually drink water out of the nside top of the water cooler like that?

(Objected to.)
(Col. Pearre:) We proffer to show that this was the kind of a ooler that was on the engine that night and we proffer to prove it y that witness that this was the identical cooler used on that engine.
(Proffer was afterwards changed as to the identical cooler.)
(Admitted with proffer.)

Q. Do you not know that it is the practice and custom of the nen to use the inside top of the water cooler to drink water out of?
A. No, sir. It is not a custom.
Q. Is that the kind of a cooler they have?
A. Yes, sir. That is the kind.
Q. Is that the kind that was on that engine that night?
A. Yes, sir.

(By Witness:)

Q. If you found the cooler why could you not find the cup with the B. & O. initials on it?
A. You might have taken it into the pit. Why did you not tell where it is?
A. I thought you had it.

(Col. Pierre:) I do not mean to say that this was the identical cooler that was on the engine that night.

(Witness:) Yes, sir. I thought you said that.

(Col. Pearre corrects his statement that he would prove that this was the identical cooler used on the engine that night.)

Q. Did you ever see a man drink out of the top of a cooler like this?
A. Yes, I have. I have seen them drink out of there when there was a tin cup on the engine when some one else was using it.
Q. Then they did not need a tin cup?
A. Some one else was using it.
Q. One man was and one man was not, is that right?
A. Yes, sir.
Q. After you were hurt you got on the pilot of the engine and went down to Evitts Creek Yard?
A. Yes, sir.
Q. What did you do on your way down performing your duty?
A. Yes, sir. I performed my duty.

Q. What did you do?
A. I threw switches.
66 Q. You said that you were sick and climbed up on the engine?
A. Yes, sir. I climbed upon the pilot and said there was an accident, anl the engineer said, "Let's go," and tooted his whistle.
Q. Did you talk to Albright?
A. Yes, sir.
Q. You got up in the cab and told Albright about your injury and the accident on your way down?
A. Before we started; yes, sir.
Q. Then you got out of the engine on the pilot?
A. Yes, sir.
Q. What did you first do?
A. Waived my lantern.
Q. Then what?
A. I did not have anything to do until I got to Evitts Creek.
Q. What did you do then?
A. Got off there and threw a switch.
Q. Then what?
A. Threw it back and climbed up on the step of the tank.
Q. Then what did you do?
A. Coupled up the train.
Q. Anything else?
A. Coupled the air hose and gave the signal.
Q. How do you couple air hose?
A. Put them together that way (indicating).
Q. Do you go between the cars?
A. Yes, sir.
Q. How far are they from the ground?
A. About two feet.
67 Q. Then you had to stoop down to get it, did you not?
A. Yes, sir. You can not stand up and get them.
Q. Then what did you do?
A. Brakeman Bohrer had the brakes off and the air was turned on and we were ready to go after we tried the air brakes.
Q. What did you do?
A. Climbed up on the engine.
Q. Then what did you do to perform your next duty?
A. I had no moving duty to do until we arrived at Magnolia, and I found that my back was stiff.
Q. You came to Green Spring first, did you not?
A. Yes, sir.
Q. What did you do there? Did you take water?
A. No, sir.
Q. What time did you leave Levitts Creek?
A. I do not know.
Q. You had your watch?
A. Yes, sir.
Q. Did you take water at Evitts Creek?
A. No, sir.

Q. Then you came to Magnolia?
A. Yes, sir.
Q. Did you take water there?
A. Yes, sir.
Q. What did you do? You had to go back between the cars and uncouple them and stoop down and raise the hose so as to get the coupling pin out, did you not?
A. Yes, sir.
Q. Then what did you do? Couple it up again?
68 A. Yes, sir.
Q. Stooped down?
A. Yes, sir. I am not sure whether I coupled it up again or not.
Q. What was next duty you performed after that?
A. We stopped at Hansrote and I walked up with the conductor to the telegraph office to see what was the trouble and what they were holding us for and there is where the conductor made out the accident report.
Q. Did you request him to make out an injury report?
A. It was not any more my request than it was his. It is required by the company when a man gets injured.
Q. Did you call his attention to it?
A. Yes, sir.
Q. You went into the telegraph office?
A. Yes, sir.
Q. Were you standing near him?
A. I was not any closer to him than I am to you now.
Q. Did you tell him what to put in the report?
A. The questions are on the report.
Q. Did he ask you the questions?
A. Yes, sir. He asked me how I come to get hurt and where.
Q. Did he ask you these questions that are contained in this report?

(Witness is shown report.)

(The Court:) Without seeing the report, I do not see how he can answer it.

Q. Did you see the report. Did you see him making it out?
A. Yes, sir; I saw him making it out.
Q. Did you read it?
69 A. No, sir.
Q. Did he read it to you?
A. As I remember, I think he did.
Q. Then you knew what was in it?
A. Yes, sir.
Q. That takes you down to Hansrote. You went east of Hansrote?
A. Yes, sir.
Q. Did you ask to be relieved after the report was made out?
A. No, sir. I do not know that I made it known to the train dispatcher.
Q. Could you have been relieved?

A. Sometimes they will relieve you and sometimes not.
Q. When you are sick?
A. I have heard fellows ask for relief and not get it.
Q. Did you do anything else after you left Hansrote?
A. No, sir. Only came back on the engine.
Q. Where was the next point you stopped?
A. Sir Johns Run.
Q. What did you do there?
A. I simply uncoupled the engine.
Q. You uncoupled the hose just the same as before?
A. Yes, sir. I uncoupled and Thom Ambrose coupled them up.
Q. Did you do that more than once?
A. No, sir.
Q. Then you went on to what point?
A. Cherry Run.
Q. What did you do there?
70 A. Took water there.
Q. Then you uncoupled and coupled up the same as before did you not?
A. I am not sure about that. May be the conductor did it.
Q. What was your next stop?
A. Cumbo Yard.
Q. What were your duties there?
A. To call the yard master on the telephone.
Q. What did you do to do that? Get off your engine?
A. Yes, sir; and go across the yard a little piece to a post where a telephone is on the post.
Q. Then what did you do? Come back to your engine?
A. No, sir. I stayed there to see if the track was ready. While I was waiting there the yard master called up and said it was all right to pull in. Conductor Ambrose coupled up the engine and I got in and rode down to the yard.
Q. The engine was coming towards you?
A. Yes, sir.
Q. It was moving?
A. Yes, sir; very slowly.
Q. And you were able to get on while it was moving?
A. Yes, sir.
Q. Then what else did you do?
A. Rode the engine down to the east end of the track and threw the switches and then left the engine go back.
Q. What kind of a switch is it?
A. It is a ball switch.
Q. You stooped down and threw it over, do you not?
A. Yes, sir.
Q. What does the ball weigh?
71 A. About fifteen pounds.
Q. Then what did you do?
A. That was the last work I done.
Q. You said your health was good?
A. Yes, sir.

Q. Did you not have tuberculosis?
A. No, sir.
Q. Did you not contract that tuberculosis from your wife?
A. No, sir; not that I know of.

Whereupon the witness was asked the following question:

Q. She did die of tuberculosis, did she not?

(Objection.)
(Col. Pearre:) We proffer to prove by other witnesses that when this man was examined, almost immediately after this accident, they found evidences of old tubercular sores in his lungs.
(The Court:) What is the object of showing that here?
(Col. Pearre:) We want to show that the witness was not in good health.
(The Court:) We do not think that is admissible.
To which question the plaintiff objected, and the Court sustained said objection and refused to permit the question to be asked and the testimony to be given in evidence, whereupon the defendant excepted and prays the Court to sign this its eighth bill of exception, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the foregoing bill of exceptions, which is made a part hereof, as fully as if the same were here incorporated, the said question was not asked or an-
72 swered.

And the witness further testified:

Q. When did you re-light your lantern after it went out in the cinder pit?
A. After I got back on to the engine. I tried to light it before I got there, but all the matches I had in my pocket were ruined by the water.
Q. What rail was it that you fell on when you stepped into the pit?
A. It was the north side rail of the south fire track.
Q. You put your right foot on that rail and then stepped with your left foot and fell in, is that right?
A. Yes, sir.
Q. You said you jumped back?
A. Yes, sir.
Q. How deep did you go into the water there?
A. I was hanging in the water up to my arms.
Q. Have you not said that the water was only about four feet deep?
A. No, sir; I did not say that.
Q. Were you advised by Mr. Owens or Dr. Hawkins to submit to further treatment for your injury?

(Objection; objection overruled.)

A. I submitted to everything they wanted me to until Decemb
17, when Dr. Hawkins and Dr. Owens wanted to put me in a plas
of paris case for three months, when I objected.
Q Did they tell you what injuries?
A. They said for the spine and hip.
Q. I believe you said that the order book was given to you
Tommy Reese?
A. Yes, sir.
Q. Were you not told to prepare yourself on that book of ru
so that you could pass an examination?
73 A. We are all supposed to do that.
Q. Were you not told that at that time?
A. No, sir.
Q. When was the book given you?
A. About Jan. 1, 1913.
Q. Are you sure of that?
A. I do not know exactly.
Q. Was it within a week of Jan. 1, 1913?
A. Yes, sir.
Q. It was not in March?
A. No, sir; I do not think so.
Q. Were you not told when it was given to you you should p
pare yourself for an examination on it?
A. I remember that he said you fellows will have to prepa
yourselves for promotion.
Q. Did you not know that that book would not go into eff
until November, so as to give you men time to read up on the bo
and give you time to prepare for the examination?
A. I said that I was told that that book went into effect on Jan.
1913.
Q. Did you not know that there was an order to that effect?
A. No, sir.

Redirect examination:

(By Mr. Doub:)

Q. You say you knew of the depth of the cinder pit from t
man with whom you boarded?
A. Yes, sir.
Q. Did you learn that before the accident or after?
A. Before the accident.
Q. How long before?
74 A. He was the man who helped build the cinder pit.
Q. Did you notice this water tank, this cooler? Does
have the B. & O. initials on it?
A. Yes, sir; I noticed that.
Q. Did you notice that spicket?
A. Yes, sir.
Q. What is that for?
A. A tin cup.
Q. Does the tin cup have any initials on it?

A. Yes, sir.
Q. What?
A. B. & O., the same as that cooler.
Q. You say Dr. Hawkins and Dr. Owens wanted to put you in a plaster of paris cast?
A. Yes, sir.
Q. Did they know that you had a case coming up in a month?
A. Yes, sir.
Q. They are physicians of the B. & O. R. R. Co.?
A. Yes, sir.
Q. Do they treat the men as first aid to the injured or do they continue to treat them?
A. They continue to treat them.
Q. When they first came to see you in October, were they in the employ of the Baltimore and Ohio Railroad?
A. Yes, sir.

Whereupon the witness was asked the following question:

Q. Will you look at this book of rules No. 10367, marked "Rules of the Baltimore and Ohio Railroad Co., for Government of the Operating Department," and on the fifth page have the signature of S. A. Potter. Will you look at these rules and say what they are?

(Objection; objection overruled.)

75 To which question the defendant objected, but the Court overruled said objection, and permitted the said question to be asked and the testimony to be given in evidence, whereupon the defendant excepted, and prays the Court to sign this its ninth bill of exception, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the aforegoing bill of exceptions, which is hereby made a part hereof as fully as if the same were here incorporated, the said question was answered and the following evidence given:
And the witness further testified:

Q. What are they?
A. Rules of Government.
Q. Are these the rules that were in force prior to the time that the rules dated Jan. 1, 1913, went into effect?
A. Yes, sir. They are the rules prior to Jan. 1, 1913, and these are the new rules that superseded them.

W. H. CLARK, a witness of lawful age, produced in behalf of defendant, being duly sworn, testified as follows:

Direct examination:

(By Col. Pearre:)

(Witness is given pictures marked "Defendant No. 7 and 8—Feb. 27, 1914" and Defendant No. 7 and 8.)

Col. Pearre says the dates of the others are Dec. 13 and Dec. 1913. Also Feb. 5, 1914. Those with the snow in them were ta Feb. 5, 1914. The pictures are offered in evidence.

(Mr. Doub:) We object to the pictures going in as evidenc this time. The identification of the pictures we now l 76–78 go in.

(By Col. Pearre:)

Q. Did you notice the arrangement for lighting the pit when took the photograph, Mr. Clark?

A. Yes, sir.

Q. Show to the jury where the lights were?

(Objection; question withdrawn.)

Substituted as per agreement of Attorneys herewith.

"Drs. Thomas W. Koon, G. L. Broadrup, James T. Johnson J. H. Spicer, called on behalf of the plaintiff, testified that upon amination of Harvey W. C. Whitacre, the plaintiff, after the a dent testified to, they found that he was suffering from a fract of the hip and displacement of the head of the femur, on acco of the spreading of the ascetabulum or socket, caused by the f ture, which caused it to widen when his weight was put upon and which was very painful, and that as a result ankylosis of spine had developed, and that these injuries were permanent, that he would not be able to resume his usual occupation, and t there was probability that the disability would increase as he wo continue to put his weight upon the leg, and that he also suffe from congestion of a portion of the right lung."

79 Whereupon the plaintiff made the following offer, viz:

(Mr. Doub:) We want to offer in evidence Rule 808 on p 154 of book of Rules dated Jan. 1, 1913.

80 (Objection on ground that no foundation has been offe to show that those rules were in force at this time and matter of fact they were not.)

(Mr. Doub:) We offer them the first page stating when the ru were to take effect.

Mr. Keedy:) That is trying to prove the rules by the ru themselves.

(The Court:) The plaintiff said they were in force as he w working under them and they were given to him.

(Mr. Keedy:) They ought to proffer for what purpose they w

to show the rules, and if their proof does not come up to the proffer, it is not admissible.

(Mr. Doub:) We proffer to show that the engineer had been there, and was absent at the time the fireman spoke to the plaintiff relative to the tin cup as testified to by the plaintiff.

(Admitted with the proffer; objection; objection overruled; exception reserved.)

The rules are offered as a whole. Objections and exceptions cover each of the rules and all of them together.

To which rule No. 808 on page 154 of the book of rules dated January 1, 1913, as proffered in evidence by the plaintiff, the defendant objected, but the Court overruled the said objection and admitted the said rules No. 808 on page 154 of the book of rules dated January 1, 1913, in evidence, whereupon the defendant excepted and prays the Court to sign and seal this its tenth bill of exceptions, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the aforegoing bill of exceptions, which is hereby made a part hereof, as fully as if the same had been here incorporated, the said rule No. 808 on page 154,
81 of the book of rules, dated January 1, 1913, was offered in evidence as follows:

Rule No. 808, page 154, under heading

"Freight Brakeman."

"He must obey the orders of the yard master. When on duty he is under the direction of the conductor. It is his duty to attend to the brakes; be provided with and take care of and properly display train signals; assist the conductor in loading or unloading the freight; in inspecting the cars, and in doing all things necessary for the safe and prompt movement of the train."

"He must report for duty at the appointed time and when necessary assist in making up his train."

"When not engaged in duty elsewhere he must occupy the post assigned to him."

"The front brakeman must in like manner protect the front of the train, when the fireman cannot leave the engine."

"When on duty he is under the direction of the conductor or under the locomotive engineer in the absence of the former."

Page 155.

"He must examine and know that the brake shafts and attachments, ladders, running boards, steps, hand holds and other parts and mechanical appliances which he is to use are in proper condition; if not, put them so, or report them to the proper parties and have them put in order before using."

Page 165, Section 818,

under heading

"Locomotive Engineers."

"He must report for duty at the appointed time; see that the engine is in good working order and furnished with necessary supplies; give checks for fuel and stores received, and assist in
82 shifting and making up the train when required."

"He must not leave the engine during the trip except in case of necessity, and must then leave the fireman in charge."

Page 167, Paragraph 819.

under heading

"Fireman."

"The fireman must report for duty at the appointed time; assist in shifting and making up the train when required; assist the locomotive engineer in keeping a lookout for signals and obstructions; take charge of the engine during the absence of the locomotive engineer, and assist in making repairs when required."

"He must not run an engine in the absence of the locomotive engineer, unless in some emergency he is directed to do so by the conductor or some one in authority. He must be familiar with the rules for the protection of trains and use of signals which he must be prepared to use promptly."

"He must protect the front of the train when necessary."

"Fireman shall read all train orders received by the locomotive engineer and must have a correct understanding of them."

C. G. TREISLER, a witness of lawful age, produced in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

(By Mr. Doub:)

Q. Mr. Treisler, what is your business?

A. Superintendent of the Metropolitan Life Insurance Co., for Western Maryland and West Virginia.

Q. Where do you reside?

A. Oak Hill Ave., in Hagerstown.

83 Q. You are in the insurance business?

A. Yes, sir.

Q. Do you know if American Insurance Companies have tables showing the annuities, the value of an income, etc.?

A. Yes, sir.

Whereupon the following question was asked:

Q. Will you look at your tables? State to the jury whether those tables show the value of an income? State whether you can testify

from these tables the present value of an income of sixty-five dollars per month for a period of thirty-one years?

To which question the defendant objected, but the Court overruled the said objection and permitted the question to be asked and the testimony given in evidence, whereupon the defendant excepted and prays the Court to sign this its eleventh bill of exception, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the aforegoing bill of exceptions, which is hereby made a part hereof as fully as if the same were here incorporated, the said question was asked and the following evidence given:

Q. What is the expectancy of a man of twenty-six years in good health?

(Mr. Doub:) We proffer to show that the plaintiff is absolutely incapacitated and will be for the balance of his life.
(Objection; objection overruled; exception reserved.)

A. Thirty-eight and twelve hundredths (38.12) years.

The witness then further testified:
Whereupon the following question was asked:

Q. Will you state to the jury what the present worth of a monthly income of sixty-five dollars per month during a period of thirty-eight years would amount to according to the American system of calculation?

84–106 To which question the defendant objected, but the Court overruled the said objection and permitted the question to be asked and the testimony to be given in evidence, whereupon the defendant excepted and prays the Court to sign this its twelfth bill of exception, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the aforegoing bill of exceptions which is hereby made a part as fully as if the same were here incorporated, the said question was asked and the following evidence given:

A. $15,655.20.

And the witness further testified:

Cross-examination.

(By Col. Pearre:)

Q. That is based upon the theory that he is going to live thirty-eight and twelve hundredths years?

A. I am giving you the present worth of sixty-five dollars per month for thirty-eight and twelve hundredths years.

Q. Will you state whether it was not based upon the assumption that the man would live thirty-eight and twelve hundredths years more?

A. The calculation was based upon that.

Q. If the man did not live that long it would not amount to that?

A. In calculations of this kind life insurance companies do not take one life, but all lives together and take the average.

107 Mr. JAMES P. GAFFNEY, a witness of lawful age, produced in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination:

(By Mr. Doub:)

Q. What is your name?

A. James P. Gaffney.

Q. Where do you reside?

A. Cumberland, Maryland.

Q. What is your profession?

A. Civil engineer.

Q. Have you ever followed any other profession besides civil engineer?

A. No, sir.

Q. Have you ever acted as railroad engineer?

A. Yes, sir. Civil engineering comprises that.

Since 1871 I have been continuously engaged in civil engineering. I was first an engineer on the Randolph and Oswego Railroad, which runs across the Hudson River from Kingston on the
108 Hudson across the Catskill Mountains. I was three years with that road. I was then with the Victoria Railroad of Canada for two years; then in Alabama with the Selma, Rome and Dalton Railroad from '76 to '78—two years. Then I came to Cumberland and built the Pennsylvania Railroad in Maryland; engineered and built it; and then I built the George's Creek and Cumberland Railroad. I continued with the George's Creek and Cumberland from '79 until 1906, when I went with the Norfolk and Southern Railroad running down with branches to Raleigh and remained there until 1909. Then I opened an office as consulting engineer in Cumberland, and two years ago I was appointed city engineer of the City of Cumberland.

Q. You are now city engineer of the City of Cumberland?

A. Yes, sir.

Q. Have you examined the cinder pit spoken of here?

A. Yes, sir. I have been there on three occasions.

Q. When did you first examine it?

A. A little more than a month ago and then about a week after that and then only last Saturday.

Q. Was there snow on the ground?

A. Snow on the ground the last time; yes, sir.
Q. No snow on the ground previous to that?
A. No, sir. No snow.
Q. Will you state to the jury how that cinder pit is constructed and describe it to the jury?
A. You mean the pit?
Q. Yes, sir; the pit?
A. There are two wide pits about twelve feet wide, each running parallel, and between these two pits there is a track on which cars are placed to load the cinder and parallel to these are two other tracks on which the engines run and ashes are raked from the bottom of the engines. They are built on the incline so that as the ashes come down they run into the centre of the pit.
Q. What is the length?
109 A. 180 or 200 feet.
Q. What is the width?
A. Three tracks of five feet would be fifteen feet and two tracks of twelve feet would be twenty-four. I suppose over forty feet. It is practically fifty feet between the up-rights.
Q. How deep is the cinder pit?
A. About nine feet. There are two pits which are each nine feet deep and twelve feet wide and then there are pits between the rails on which the engines run on the sides. They slant down toward this larger pit so that the ashes go down in there and then buckets take them and put them on the cars.
Q. What are cinder pits used for?
A. For disposing of the ashes taken from the engines.
Q. What is the water for?
A. To cool off the red hot cinders and ashes.
Q. What is the color of the water in the cinder pit?
A. When I last saw it it was extremely black. I suppose in contradistinction to the snow. Previous to that it was a gray color, with a very fine skim of dust.
Q. What gives it that color?
A. The ashes. The light portions of coal burn. The ashes cause that.
Q. What is the general appearance of the railroad yard?
A. It is dark more or less with cinders, with coal dust and all. Like all our yards in Cumberland are.
Q. What straddle the cinder pit?
A. Parallel series of trestles and on these trestles there is a traveling crane that moves up and down with an electrical arrangement that drags the buckets.
Q. Will you state whether the cinder pit as constructed and maintained by the Baltimore and Ohio Railroad is or is not safely constructed and maintained?
A. I consider it very unsafe.
110 Q. In what respect?
A. Inasmuch as persons crossing the track might walk into it inadvertently not knowing where he was going.
Q. Mr. Gaffney, will you look at these two pictures and state

whether they fairly represent that cinder pit and the location as it is now and the manner in which it is maintained?

A. Yes, sir. They are both fine photographs of the place?

(Mr. Doub: We offer picture marked "Plaintiff's Picture No. 2, taken Aug. 12, 1913," and "Plaintiff's Picture No. 1, taken Aug. 13, 1913." We offer them to the jury.)

Q. Mr. Gaffney, how far apart are the up-rights?

A. About eighteen feet, I think.

Q. I see in the picture something like a bench running between the two up-rights. What do you call that?

A. I call that a strut.

Q. How many of those struts are there?

A. I remember the first and then there is a space or two—open spaces—and then there is another strut and then in another space a strut. Three or four struts, I remember.

Q. Will you state whether the cinder pit is on a level with the land and tracks adjoining?

A. Yes, sir—on a level with the tops of the ties.

Q. Mr. Gaffney, just come and show the jury where the cinder pit begins.

(Witness takes photograph and shows it to the jury.)

A. The cinder pit commences here. The deep cinder pit is here in this place, twelve feet wide—and this here—they are cinder pits probably twelve feet wide and they slant down towards the depth here, and the ashes come down here and this bucket comes down and grabs them out and loads them on these cars.

Q. What is this frame here?

A. That is to stop any person from walking along the track and inadvertently going into it.

111 Q. That is at the end?

A. Yes, sir; at the end.

Q. Where are those struts that you spoke about?

A. Here is one—here. (Indicating on picture.)

Q. This is one here and one back here.

A. Yes, sir. That faces the dry system where the diagonal braces are.

Q. The diagonal braces are only found where the struts are?

A. Yes, sir.

Whereupon the witness was asked the following question:

Q. Will you state to the jury in what way that cinder pit could have been made reasonably safe?

To which question the defendant objected, but the Court overruled the said objection, and permitted the question to be asked and the testimony to be given in evidence, whereupon the defendant excepted and prays the Court to sign this its eighteenth bill of exceptions, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the aforegoing bill of exceptions, which is hereby made a part hereof as fully as if the same were here incorporated, the said question was asked and the following evidence given:

A. There are several ways in which it could have been made safe. By having gates there or bars along continuous as you saw in the struts to prevent any person walking across the track from falling into that pit—as a farm gate, an elevator gate or any kind of a simple or movable bar—a three-by-four bar or a two-by-six bar dropped down that would prevent a person from walking across, or they might have signs put there—danger signs—just as any danger sign might avoid any person inadvertently from walking in.

112 Q. Is there any reason why the steel frame work could not have been made wider?

(Objection; objection sustained.)
And the witness further testified:

Cross-examination.

By Col. Pearre:

Q. As I understand you, your active work as an engineer began in 1871?
A. Yes, sir.
Q. With a railroad?
A. Yes, sir. My active work began on Staten Island in May of 1871, and in July of that year I went on railroad work.
Q. So in July, 1871, you began your railroad work?
A. Yes, sir.
Q. The first railroad was what?
A. Randolph and Oswego. Then for New York, Kingston and Hudson we constructed a line out in New York about eighty miles. There was a piece built to it. During the winter it was changed to New York, Kingston and Syracuse.
Q. How far was that additional line?
A. About 150 miles.
Q. Altogether?
A. No, sir. From Stamford.
Q. Did you build ony cinder pits or operate any cinder pits in connection with that road?
A. I do not remember.
Q. Then you went to the Victoria Railroad in Canada?
A. Yes, sir.
Q. Where does that run?
A. From Lindsay in Ontario it runs northwest to Quebec.

113 Q. What distance?
A. About twenty-five miles and located about 100 miles more. I left Canada then because I was disgusted with the climate.
Q. Then you built twenty-five miles of railroad in Canada?
A. Yes, sir.
Q. And laid out about 125 miles more?

A. No, sir; I left there.
Q. How long were you with the Randolph and Oswego Railroad
A. Two years.
Q. And three years in Canada?
A. Yes, sir.
Q. When you were in Canada did you build any cinder pits?
A. No, sir.
Q. Then you went to Alabama with the Selma, Rome and Dalto Railroad?
A. Yes, sir.
Q. As engineer?
A. Yes, sir—consulting engineer.
Q. Did you design any cinder pits there?
A. No, sir.
Q. Then you came to Cumberland?
A. Yes, sir.
Q. When?
A. In 1878.
Q. Then you laid out the Pennsylvania Railroad in Maryland
A. Yes, sir.
Q. Did you build any cinder pits with that railroad?
114 A. No, sir.
Q. Then you went to the George's Creek Railroad?
A. Yes, sir.
Q. How long were you with the Pennsylvania Railroad?
A. Six or seven months.
Q. Then you went to the George's Creek Railroad?
A. Yes, sir.
Q. Did you build any cinder pits with the George's Creek Rail road?
A. Yes, sir. I built the round house in 1880 and soon after tha we built the cinder pit.
Q. How long ago was that?
A. Over twenty years ago.
Q. Has there been much advance in the construction of cinde pits since then?
A. Yes, sir.
Q. What was the character and size of the cinder pit of the George's Creek Railroad pit?
A. Sixty-feet long and just between tracks and it run along be tween the tracks and a side track along. There was none of that structural arrangement we have here.
Q. Can you describe the construction of that cinder pit as you have described this cinder pit?
A. It was I believe about five feet deep, simple rails along the side and engine ran on it and ashes dropped out.
Q. Was there not at each end a concrete pier and concrete post?
A. No, sir. We did not have any concrete work at all in the George's Creek pit.
Q. Is that pit still there?

A. Yes, sir. I guess so, but I do not know.

115 Q. Did it not have a concrete wall and then a pillar and then another pillar and then a third pillar and then another abutment at the other end?

A. No, sir. That is not the way I constructed it.

Q. You say the pit is still there?

A. Yes, sir, but it may be filled up. I have not been there for years.

Q. You say that was modern at that time?

A. Yes, sir.

Q. How does that compare with present construction?

A. Well, there has been changes.

Q. Then you had small engines?

A. Yes, sir.

Q. Was that a dry pit or a water pit?

A. Dry pit. We had a hose to cool off the ashes.

Q. Did you have guard rails at that pit?

A. No, sir.

Q. Any danger signs?

A. No, sir.

Q. Did you put up rails of any kind to prevent people from falling into it?

A. Yes, sir. The wheel track came along and ran right by that to the machine shop. No person could have passed through there.

Q. You put no barriers up there?

A. No, sir.

Q. No signs?

A. No, sir. It was trifling this ash pit that I spoke about along in comparison with the one there. We had only ten engines to take care of there—with thousands here. They were emptied in the evening.

116 Q. What was the length of that railroad?

A. The George's Creek?

Q. Yes, sir.

A. The George's Creek took in the Pennsylvania. That is the reason I said I was only with the Pennsylvania in Maryland several months. When I went to go to the George's Creek the Pennsylvania had secured it and completed the building into Cumberland and the two roads included about forty-two miles altogether.

Q. The George's Creek run from Cumberland to Lanoconing?

A. Yes, sir.

Q. How far was that?

A. Twenty-two miles and another section ten miles, making thirty-two miles.

Q. The Pennsylvania Railroad, how long was that?

A. About eight miles.

Q. So in the whole George's Creek System, including the Pennsylvania Railroad of Maryland, how many miles were there?

A. About forty miles.

Q. Then you went to the Norfolk and Southern?

A. Yes, sir.

Q. What was the length of that railroad?

A. About 880 miles. It ran from Norfolk and down through Elizabeth City to Eden and Chockquinity and from there through Little Washington to Newbern, and altogether the system amounted to 880 miles.

Q. How long were you with that road?

A. Until 1909.

Q. About how many years?

A. Two and one-half years.

Q. Did you build any cinder pits there?

117 A. No, sir. The road went into bankruptcy and at Chockquinity it had made large arrangements.

Q. You built no cinder pits on that road?

A. No, sir. But we had designed them.

Q. Did you design them yourself?

A. Well, I had a fine engineering force and I did not design them myself.

Q. Were the plans similar to the plans of the Baltimore and Ohio cinder pit at Cumberland?

A. Not exactly.

Q. It was done in your office under your general supervision, but not by you?

A. Yes, sir.

Q. Then you built one cinder pit sixty feet long on the Georges's Creek Railroad?

A. Yes, sir. That is all.

Q. And what you know of cinder pits is gathered from outside experience?

A. Yes, sir.

Q. Then you came back to Cumberland and opened an office as consulting engineer?

A. Yes, sir.

Q. And you were appointed city engineer?

A. Yes, sir.

Q. *There* you do not build cinder pits?

A. No, sir.

Q. How long have you been out of the railroad work?

A. Five years. That is building railroads. But I have been on railroads.

Q. I mean officially connected?

A. Yes, sir; five years.

118 Q. You say you visited this cinder pit?

A. Three times.

Q. When?

A. Once about a month ago and then a week after that and then about last Saturday.

Q. At whose request did you go there?

A. At my own.

Q. Did you not go at the request of the plaintiff's attorney in this case?

A. No, sir. I went down voluntary when he asked me about it

I went down and looked it over. I seen Mr. Doub and he showed me the photographs, and I said they might be misleading and I went down to see for myself.

Q. You say this cinder pit is for getting hot ashes out of the way and removing them?

A. Yes, sir.

Q. And you found three tracks?

A. Yes, sir. There were two tracks where they emptied cinders in and the other track.

Q. Two tracks for throwing cinders in and between these two tracks a track where they have cars?

A. Yes, sir.

Q. How do they get ashes out of the cinder pit?

A. By buckets—drags.

Q. How do they get ashes out of the engine into the pit?

A. They rake them out and they fall into the pit.

Q. And there is a slanting wall?

A. Yes, sir.

Q. What is the idea of that?

A. To make it deep so that buckets can grab them.

119 Q. Do you know what the depth of the pits under the engines is?

A. I measured them last Saturday and they are three feet.

Q. Towards what point?

A. Towards the trestle side.

Q. The outside in each case?

A. Yes, sir.

Q. The least depth is three feet. And then it runs down to eight feet?

A. No, sir. My measurement was nine last Saturday. Some men were there and they said it was three feet. I saw them and I asked the man why he was doing it.

Q. The shallowest part is three feet?

A. Yes, sir.

Q. And the depth is what?

A. I do not know. I only measured the outside depth.

Q. When these ashes are drawn out in the pit below what do the men do towards getting them into the deep pit?

A. I saw a man with a scraper shove them down in the cinder pit.

Q. The scraper would go down and shove the ashes into the cinder pit?

A. Yes, sir. The idea of getting it into the deeper pit is for the bucket to go down and get it and put it on the cars.

Q. You said that last Saturday when the snow was there the appearance of the pits were darker?

A. Yes, sir.

Q. You attribute that to the snow?

A. Yes, sir.

Q. The last time you gave testimony the ashes were a

120 lighter color?

A. Yes, sir. A gray because the rest was mixed with coal

Q. You could distinguish the difference very easily?
A. Oh, yes; I could.
Q. By the color?
A. Yes, sir. By the color.
Q. You said the reason for putting guard rails or obstructio there was to keep those who would walk into the pit from wa into there inadvertently?
A. Yes, sir.
Q. If a man was looking where he was going and was wat he would not fall into there, would he?
A. No, sir. I think not.
Q. Please state whether in your opinion as an engineer if t a modern and up-to-date cinder pit?
A. Yes, sir. The best I ever saw.
Q. Please state to the Court and jury whether you have ever any other cinder pits of this same design and construction?
A. No, sir. I have seen drawings in my engineer work.
Q. Mr. Gaffney, will you please state whether you have ever any modern water cinder pit protected by guard rails or barrie
A. No, sir. I have never seen any constructed like that.
Q. Have you ever seen any cinder pits guarded as you have cated?
A. No, sir. Except in the George's Creek Railroad pit there obstructions to keep people from falling in.
Q. Did you not say that the difference in the George's Creek road pit and the Baltimore and Ohio Railroad pit is so great t would not require any protection?
A. No, sir. Not just that. I said it was so close around the table that it did not need protection.
121 Q. The roundhouse and yard of the George's Creek road was very much smaller?
A. Yes, sir.
Q. You said there was no necessity for guard rails at the Gec Creek pit at all.
A. But with understanding that there were some wheels ar there.
—. ——.
A. Yes, sir. A track with car wheels on it.
Q. They were not put there to act as a barrier?
A. No, sir.

Redirect examination.

(By Mr. Doub:)

Q. Did you ever see this pit in the Cumberland yards of the B more and Ohio Railroad at night, Mr. Gaffney?
A. No, sir. I did not.
Q. And you were there three times in the day time?
A. Yes, sir.
Q. You stated that this pit was well constructed?
A. Yes, sir.

Q. Fine structure?
A. Yes, sir. Fine structure.
Q. Did that relate to its safety?
A. No, sir.
Q. Mr. Gaffney, have you kept up with your profession as a railroad engineer since you abandoned railroads?

(Objection; objection sustained; leading.)

J. B. FERGUSON, witness of lawful age, produced in behalf of the plaintiff, being duly sworn, testified as follows:

122 Direct examination.

(By Mr. Wagaman:)

Q. Mr. Ferguson, what is your full name and what is your profession?
A. John B. Ferguson; civil engineer.
Q. Where were you educated?
A. Massachusetts School of Technology.
Q. Is that a good school?
A. Yes, sir.
Q. When did you graduate?
A. In '99.
Q. Where have you been employed in your profession?
A. With the Chicago, Burlington and Quincy Railroad; the Boston and Maine, the Pennsylvania Railroad, Ohio Electric Railway and for the last five years in private practice in Hagerstown.
Q. You live here now and have been for five years?
A. Yes, sir.
Q. How long were you with the Chicago, Burlington and Quincy?
A. Five and one-half years.
Q. Boston and Maine?
A. Simply spent one summer with them.
Q. How long with the Pennsylvania?
A. About four and one-half years.
Q. Mr. Ferguson, have you heard the testimony of these witnesses that have described the location and construction of the ash pit and have you seen the location of the Baltimore and Ohio cinder pit at Cumberland?
A. Yes, sir.
Q. State whether or not that pit is reasonably safely constructed?

123 (Objection; objection sustained.)

Q. Mr. Ferguson, in the engineering business which you have followed in connection with the work done for these various railroads, have you had anything to do with the construction of cinder pits?
A. Yes, sir.
Q. Where and when?
A. I had the last piece of work with the Pennsylvania Railroad,

which was the direct charge of a very large coaling station jus
of Coatsville. I suppose the cost was a quarter of a million d
In connection with that was a very large plant.

Q. Is the construction of cinder pits the general work or s
part of the work of a railroad engineer?

A. Well, I should say it would be part of his general work
course, there is more than one department concerned usual
the construction of a cinder pit.

Q. Have you seen any other cinder pits?

A. Yes, sir.

Q. Are you familiar with cinder pits?

A. Yes, sir. In general.

(Question is asked, objection made and question was withd
Witness, however, stated that he has been here all the time and
all the testimony.)

Q. Mr. Ferguson, you have heard all the testimony you
stated. Assuming the testimony given to be true, state whet
not in your opinion the ash pit described is reasonably sa
persons forming members of crews of trains or engines st
in that immediate locality or who are obliged to assemble
for reason of work in that neighborhood?

(Objection; objection sustained as to that part of the questi
to if they assembled there.)

Whereupon the following question was asked:

Q. Assuming the testimony which you have heard to be
state whether or not in your opinion the ash pit is r
124 ably safely constructed and maintained in reference to
bers of crews who go there in that neighborhood in th
charge of their duties?

To which question the defendant objected, but the Court
ruled the said objection and permitted the question to be
and the testimony to be given in evidence, whereupon the defe
objected, and prays the Court to sign and seal this its ninet
bill of exception, which is accordingly done this 1st day of
1914.

ROBERT R. HENDERSON. [SEA
M. L. KEEDY. [SEA

After offering the evidence set out in the aforegoing bill
ceptions, which is hereby made a part hereof as fully as if the
were here incorporated, the said question was asked and th
lowing evidence given:

(By the Court:)

Q. Mr. Ferguson, what do you know about the constructi
cinder pits?

A. I never saw the one at Cumberland.

(By the Court:)

Q. Do you know anything about the construction of cinder pits?

A. I have spent ten or twelve years around railroads. I had charge of this one at Thorndale, which took about ten or twelve years to construct and during my experience with railroads I was working around the yards. I have traveled a great deal on freight trains. I lived near a railroad yard and passed by railroad yards many times at night.

(By the Court:)

Q. Any cinder pits there?

A. Yes, sir.

(By the Court:) If he means to say from what he has said about what he knows of other cinder pits, then he may go on.

(Objection; objection overruled; exception reserved.)

A. I can understand; I think that at times the cinder pits would be dangerous.

125 (Objection.)

Q. Just answer the question?

A. I think not.

And the witness further testified:

Q. Can you say whether it is or not?

A. I would say it is not.

Cross-examination.

(By Col. Pearre:)

Q. That is simply your opinion, is it not?

A. Yes. I say that is my opinion.

Q. What is that opinion based upon? Is it based upon other cinder pits that you have seen?

A. Yes. Partly on that and partly on my experience in railroad yards and operations.

Q. What other pits have you seen?

A. I was stationed all one summer along side of a fairly good sized yard at Burlington.

—. ——.

A. Very ordinary one. Ashes were dumped between the rails and shoveled into a depressed track alongside of that pit.

Q. Did it have a guard rail?

A. No, sir.

Q. Have any barriers to protect people from falling into it?

A. No, sir.

Q. What was the next cinder pit you saw?

A. On the Mail Railroad, a town about 100 miles east.

Q. What was that?

A. Alliance, Nebraska.

Q. What was the character of that one?
A. The same.
126 Q. What other one?
A. In Deadwood, South Dakota, a Mail Railroad.
Q. Did that have any guard rails or barriers?
A. No, sir.
Q. What was the next one?
A. In the yard of West Philadelphia. That was a depressed track running along which makes a cinder pit.
Q. Is it a cinder pit?
A. Yes, sir.
Q. Did it have any guard rails or barriers?
A. No, sir. Not at that time.
Q. What other one?
A. Blare Furnace, at East Altoona.
Q. What was the style of that?
A. It was different—the style of the pit.
Q. What was that?
A. There was a crane and this picked up the ashes. It was a dry pit and they put the fires out by a hose with water.
Q. Did they have any guard rails or barriers?
A. I think not.
Q. What was the next one?
A. I believe there is one in the Pittsburg Yards somewhat similar to that one at Blare Furnace.
Q. In the Pennsylvania Railroad Yards?
A. Yes, sir.
Q. Does that have guard rails?
A. No, sir; I believe not.
Q. Where else?
127 A. C., H. & D. Railway at Lima, Ohio. It has the same kind of a depressed track and overhead crane.
Q. You said something about Coatsville. Do you mean Thorndale?
A. Yes, sir. Just east of Coatsville.
Q. Did they have guard railing?
A. Well, that was different. There was a design to clean out ten engines at one time.
Q. Were they water ash pits?
A. No, sir. They were dry. They were different from anything I have described yet.
Q. Describe them.
A. The ashes were thrown down and into tunnels and they were hauled through the tunnels to a concrete bin and from that bin were dumped into the receiving car.
Q. Were they protected by barriers or guard rails?
A. Yes, sir; partly. Stationary barriers separate them.
Q. Were they put up there for that purpose?
A. No, sir. Just incidental.
Q. Have you seen the Cumberland pit?
A. No, sir. Not to know them.

Q. Have you ever looked at them?
A. No, sir.
Q. I believe you testified to something about this pit not being asonably safe. In what respect is it not reasonably safe?
A. I think it is a little open in allowing men working in that ighborhood to cross tracks and fall into those pits.
Q. Do you understand that men working there as members of ain crews would have to cross these pits?
A. I suppose it would be convenient at times.
Q. Do you mean to cross these pits?
A. Yes, sir. When there is blocking of trains.
Q. Then you mean that it might be convenient for men to go ross these pits when there is blocking of trains?
A. Something like that; yes, sir.
Q. Do you know that no trains at all go up there?
A. I do not know about trains at all. I only heard the testimony.
Q. Do you know that only engines go up there?
A. No, sir. Trains may be stalled up there.
Q. Did you hear the testimony?
A. Yes, sir.
Q. Did you not hear that the trains were made up at Evitts Creek d the engine was taken down by the fireman, brakeman and engin- r about three-fourths of a mile below where the train is?
A. Yes, sir.
Q. Did you understand that there was a train of cars up here at is cinder pit?
A. Yes, sir. They might be.
Q. Did you understand that there was testimony to that effect?
A. No, sir.
Q. Did you understand that there was no train there at this time?
A. I never understood that there was no trains never there.
Q. If only engines were there and the trains three-fourths of a le away were made up would that modify your testimony?
A. I suppose that the place would be dangerous to men not fa- iliar with the neighborhood and at times men would not know here they were, particularly on very dark nights.
Q. Suppose a man knew all about the neighborhood?
A. Place would be less dangerous, but they were not familiar.
Q. Suppose he had been there twenty times by day and six times night and was very familiar with the location of the coal tipple, e engines on the ready tracks, and the ready tracks, do you still ink that it would be dangerous to him?
A. It might be dangerous to him possibly depending upon condi- ns.
Q. What do you mean by that?
A. Well, if it was a very dark night.
Q. Would a light help him?
A. Yes, sir. I think it would.
Q. Suppose four arc lights were burning over his head, would that lp him?

A. It would help him to locate the structure, I suppose.
Q. Would four arc lights 1,000 candle powers each help him to locate the pit?
A. I am not quite clear on the location of these arc lights. They are overhead and in reasonable distance.
Q. Assuming that there were four arc lights—one overhead and one on each side of 1,000 candle power each, would they help him to locate the pit?
A. Yes, sir; unless there was a heavy fog.
Q. It would take a very heavy fog?
A. Well, some nights are very foggy.
Q. Are you an expert on fogs?
A. I do not claim to be. No, sir.

Redirect examination.

(By Mr. Wagaman:)

Q. Mr. Ferguson, the pits you mentioned were all dry pits?
A. All dry pits.

130 Whereupon the witness was asked the following question:

Q. If these dry pits were filled with ashes a man might walk on those pits without injury to himself?

To which question the defendant objected, but the Court overruled the objection and permitted the question to be asked and the testimony to be given in evidence, whereupon the defendant excepted and prays the Court to sign and seal this its twentieth bill of exception, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the aforegoing bill of exceptions, which is made a part hereof, as fully as if the same were here incorporated, the said question was asked and the following evidence given:

A. Yes, sir.

And the witness further testified:
Whereupon the witness was asked the following question:

Q. If it was filled with water, would it make any difference?

To which question the defendant objected, but the Court overruled the objection and permitted the question to be asked and the testimony to be given in evidence, whereupon the defendant excepted and prays the Court to sign this its twenty-first bill of exception, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the aforegoing bill of exceptions, which is made a part hereof, as fully as if the same were here

incorporated the said question was asked and the following evidence given:

131 A. Crossing the pit?
Q. Yes?
A. Yes, sir.

And the witness further testified:

Q. If the pit were filled with water and covered over with ashes so as to have the appearance of the yard in the neighborhood of the pit, would it or not increase the danger in the water pit?

(Objection; objection sustained.)

Recross-examination.

(By Col. Pearre:)

Q. In your railroad experience in all the cinder pits you know of, have you ever known any to be protected by guard rails or barriers put there for that purpose?
A. No, sir. I have not.

Redirect examination:

Whereupon the witness was asked the following question:

(By Mr. Wagaman:)

Q. Mr. Ferguson, in your capacity as an engineer, can you state whether there is any simple and reasonable inexpensive way to protect that pit at Cumberland, from danger to persons in the neighborhood of it?

To which question the defendant objected, but the Court overruled the objection and permitted the question to be asked, and the testimony to be given in evidence, whereupon the defendant excepted and prays the Court to sign this its twenty-second bill of exception, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

132 After offering the evidence set out in the aforegoing bill of exceptions, which is made a part hereof as fully as if the same were here incorporated, the said question was asked and the following evidence given:

A. I would agree with the suggestion made by Mr. Gaffney which is shown in every third panel could be reasonably placed in every panel or some sort of a rail to prevent a man from passing by the overhead structure, or by a simple system of lights.

And the witness further testified:

Q. What system of lights?
A. Lights on lines as are often employed at stations to display danger signals?

Q. Lights stationed at this ash pit, where?
A. To guard the four approaches at each end and the side.
Q. Do you mean to put on a rail fifty feet high or down on a level with a man's eyes?
A. On a level with a man's eyes.
Q. This would be reasonably inexpensive and safe?
A. I think so.

Recross-examination.

(By Col. Pearre:)

Q. In your experience did you ever see cinder pits protected that way?
A. No, sir; I have not.
Q. Do you know the way in which this cinder pit is protected?
A. As I heard Mr. Gaffney describe it.
Q. Did you hear Mr. Gaffney describe this portion there where the ashes are drawn out from the fire boxes and that men come along and push the ashes down into the deeper part of the pit?
A. Yes, sir.
133-139 Q. Do you know what kind of a rake or pole is used for that?
A. I do not know, but I suppose similar to the ones used on the engine.
Q. A long-handled rake?
A. Yes, sir.
Q. In doing that would not they interfere with the rod there?
A. The rod would have to be moved.
Q. But you agree to that?
A. Yes, sir.
Q. You never seen any fixed that way?
A. No, sir; never knew any to be fixed that way.

Substituted as per agreement of Attorneys herewith:

"The plaintiff then offered in evidence the train sheet, showing the movement of the train on which the plaintiff was employed the night of the accident, and H. C. McAdams, a witness called on behalf of the plaintiff, who was train-master at Cumberland for the defendant company, in explanation of the train sheet, stated that the train was carried by engine No. 4153, of which Ambrose was conductor and Albright was engineer, and that the engine crew was called for 1:45 A. M., and the train crew for 2:05 A. M.; that the tonnage was 5019 tons, and that the train left Evitts Creek, at the east end of the Cumberland yards, at 2:51 A. M.; and arrived at Hansrote at 5:27 A. M., and left at 6:28 A. M., and arrived at Sleepy Creek, West Virginia, at 8:40 A. M., and left at 8:53 A. M., and that the train crew was relieved from duty at its destination, at 11:30 A. M., and the engineer was relieved at 11:40 A. M., and that the crew was paid from the time at which they were called to go to work; that the engine crew, including the plaintiff, were required to report at the engine, while the train crew were to report down at the Evitts Creek yard."

140 L. J. WILMOTH, a witness of lawful age, produced in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Doub:

Q. Mr. Wilmoth, what position do you have with the Baltimore and Ohio Railroad?

A. Road foreman of engines on the east end of the Cumberland division.

141 Q. Where are you located?

A. Cumberland, Md.

Q. Will you state to the jury if you know who has charge of the supplies placed upon the engines?

A. The storekeeper at each terminal has charge of the supplies.

Q. Are you the head of that department?

A. No, sir.

Q. What department has charge of it?

A. Storekeeper department. That comes under the Master Mechanic.

Q. That is under the Mechanical Department?

A. Yes, sir.

Q. Will you look at the paper that I now hand you, headed sixteen—twenty-one—twenty-two,

The Baltimore and Ohio Railroad Company,

Motive Power Department,

Revised Locomotive Equipment List,

and tell what it is?

A. That form is 1092 M Rev. to check up supplies on locomotives when they are turned over from one territory to another.

Q. Where does this list come from?

A. That comes from the General Superintendent of Motive Powers, office at Baltimore, I suppose.

Q. You produced this list at the former trial, did you not?

A. Yes, sir.

Q. Where did you get it?

A. At the Master Mechanic's office.

142 Q. In Cumberland?

A. Yes, sir.

The plaintiff then offered in evidence the said list headed "16-21-22. The Baltimore and Ohio Railroad Company, Motive Power Department, Revised Locomotive Equipment List."

To the admission of which list in evidence, the defendant objected, but the Court overruled said objection, and permitted the said list to be offered in evidence, whereupon the defendant excepted and prays the Court to sign and seal this its twenty-seventh bill of exception, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]

M. L. KEEDY. [SEAL.]

After offering the evidence set out in the aforegoing bill of exc
tions, which is hereby made a part hereof as fully as if the same w
here incorporated, the said list was offered in evidence in the foll
ing manner:

(Mr. Doub:) We now offer this list. The purpose is to sim
show that that is a list of articles that members of the crew were s
posed to have on their engines, with special reference to the arti
about which we have been speaking, the tin cup and the water coo

(Col. Pearre:) Objection because we say that a tin cup and w
cooler are not essential to the movement of the train—we want
of it in if anything.

(Mr. Doub:) All that is on the paper goes in, both what is
the back and all in order to overcome the objection.

(Mr. Doub:) The following equipment shall be carried on
engine—drinking cup—and the first clause on the back.

We would like to offer the jug or water cooler along with the c

143 & 144 16-21-22. Form 1092 M Rev

"The Baltimore and Ohio Railroad Company.

Motive Power Department.

Revised Locomotive Equipment List.

Locomotive Number —. Station —. Date ——, 191–.

Kind.

The following equipment will be carried loose or fixed on the l
motives, as required. Passenger, freight or switch engines.

Drinking cup.

One for passenger, one for freight and one for switch—and ot
articles mentioned on the list.

Instructions.

(On Back.)

1. "Each engineer must know that the locomotive is supplied w
the above equipment, in good condition, before commencing a d
work or a trip. A report of any shortage or defective condition m
be made to the foreman in immediate charge; otherwise the engi
will be held responsible."

After offering the evidence set out in the aforegoing bill of exc
tions which is hereby made a part hereof as fully as if the same w
here incorporated the said supply list was offered and admitted
evidence, and the following evidence was given.

(Defendant reserve- the right to call Mr. Wilmoth as a witne

145 JOHN H. H. DYCHE, a witness of lawful age, produced in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

(By Mr. Doub:)

Q. What connection did you have with this train drawn by engine 4153 on the morning of June 23rd, 1913?
A. Nothing more than fire the engine.
Q. Did you fire the engine?
A. Yes, sir.
Q. You are a fireman, then, are you?
A. Yes, sir.
Q. Do you know the distance from Cumberland to Cumbo Yards?
A. Seventy-two miles.
Q. From Cumberland in Maryland to Cumbo Yards in West Virginia, do you know the distance?
146 A. Seventy-two miles.

Whereupon the witness was asked the following question?

Q. Will you state to the jury how much coal it would be necessary to shovel to transfer a train loan of cars of fifty-six cars from Cumberland to Cumbo Yards?

To which question the defendant objected, but the Court overruled the said objection, and permitted the question to be asked and the testimony to be given, whereupon the defendant excepted and prays the Court to sign and seal this its twenty-eighth bill of exceptions, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the aforegoing bill of exceptions, which is hereby made a part hereof as fully as if the same were here incorporated, the said question was asked and the following evidence given:

A. About ten tons.

And the witness further testified:

(By the Court:)

Q. How many hours?
A. We generally make the run in eight hours if we have the road.
Q. How long have you fired?
A. Five years.

Cross-examination.

(By Col. Pearre:)

Q. How long, five years?
A. Yes, sir.

Q. Do you know how long it took that night?

(Objection; objection overruled; question changed to:)

147 Q. How long did it take you that night to make the tri
from Cumberland to Cumbo?
A. We were called at 1:45 to leave at 2; and arrived 11:40.

H. W. C. WHITACRE, recalled.

(By Mr. Doub:)

Q. Mr. Whitacre, will you state to the jury what the usage an
custom of the fireman is with reference to directing the front brak
man in the discharge of his duties in the absence of the conducto
and the engineer?

(Objection; objection sustained.)
Whereupon the following question was asked:

Q. State, if you know, if there is any custom or usage with *wi*
regard to the exercise of authority on the part of the fireman ov
the front brakeman in the absence of the conductor and the en
gineer?

To which question the defendant objected, but the Court ove
ruled the said objection and permitted the question to be asked an
the testimony to be given in evidence, whereupon the defendan
excepted and prays the Court to sign and seal this its twenty-nint
bill of exceptions, which is accordingly done this 1st day of Jun
1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the aforegoing bill of ex
ceptions, which is made a part hereof as fully as if the same wer
here incorporated, the said question was asked and the followin
evidence given:

A. Yes, there is a custom.

And the witness further testified:

Q. How long have you been a brakeman or employed on the train
of the Baltimore and Ohio?
148 A. Since August, 1909.
Q. Do you know whether the custom that you speak abou
is very general or not?

(Objection as leading; no ruling of Court.)

A. Yes, sir.
Q. How general is it?

(Objection; question changed.)

Q. To what extent does the custom prevail?
A. To a great extent.

Q. On what divisions does it prevail?
A. To my knowledge on three divisions—east end Cumberland division, west end Cumberland division and Connellsville division.
Q. Do you know if that is generally known among the men?
A. Yes, sir; it is.
Q. How long has that prevailed?
A. Ever since I have been braking.
Q. That is five years?
A. Yes, sir.
Q. Have you ever known any violations of that custom?
A. Yes, sir; I have.
Q. In what way?

(Several questions were further asked in regard to custom.)
(Objection is made to all this testimony in regard to custom.)
(Objection sustained and testimony ordered stricked out.)

The plaintiff then offered in evidence the book of rules, the two first or front pages reading as follows:

149 *"Rules of the Baltimore and Ohio Systems including Baltimore and Ohio Southwestern Railway, Chicago, Hamilton and Dayton Railway, and Staten Island Lines, for the Government of the Operating Department, Effective January 1st,* 1913.

"The rules herein set forth govern the railroads operated by the Baltimore and Ohio System and take effect January 1st, 1913, superseding all previous rules and instructions. Special instructions may be issued by proper authorities."

Signed by the autographic signature of

A. W. THOMPSON,
Third Vice President.

To the admission of which book of rules in evidence the defendant objected, but the Court overruled the said objection, and admitted the said book of rules in evidence, whereupon the defendant excepted and prays the Court to sign and seal this its thirtieth bill of exceptions, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the aforegoing bill of exceptions, which is hereby made a part hereof as fully as if the same were here incorporated, the said book of rules was admitted in evidence.

Motion is made by Mr. Keedy for defendant to have testimony of paragraph 808 on page 154, of the rules, paragraph 819, commencing on page 167, and portion of paragraph 818 on page 165, which were offered with the proffer to show that the engineer had been present at the engine and was absent at the time the conversation or direction as alleged by the fireman was given to the plaintiff stricken out. Motion is made on the ground that the proffer has not been complied with.

150 Rule No. 808, page 154, under heading.

"Freight Brakeman."

"He must obey the orders of the yard master. When on duty is under the direction of the conductor. It is his duty to attend the brakes; be provided with and take care of and properly disp train signals, assist the conductor in loading or unloading the freig in inspecting the cars, and in doing all things necessary for the and prompt movement of the train."

"He must report for duty at the appointed time and when ne sary assist in making up his train."

"When not engaged in duty elsewhere he must occupy the assigned to him."

"The front brakeman must in like manner protect the front of train, when the fireman cannot leave the engine."

"When on duty he is under the direction of the conductor or ur the locomotive engineer in the absence of the former."

Paragraph 819 on page 167 of Rules, under heading

"Fireman."

"The fireman must report for duty at the apointed time; assis shifting and making up the train when required; assist the loco tive engineer in keeping a lookout for signals and obstructions; t charge of the engine during the absence of the locomotive engin and assist in making repairs when required.

"He must not run an engine in the absence of the locomotive gineer, unless in some emergency he is directed to do so by the ductor or some person in authority. He must be familiar with rules for the protection of trains and use of signals which he n be prepared to use promptly.

"He must protect the front of the train when necessary.

"Fireman shall read all train orders received by the locomo engineer and must have a correct understanding of them."

151 Page 165, section 818, under heading

"Locomotive Engineers."

"He must report for duty at the appointed time; see that the gine is in good working order and furnished with necessary suppl give checks for fuel and stores received, and assist in shifting making up the train when required.

"He must not leave the engine during the trip except in cas necessity, and must then leave the fireman in charge."

(Court is divided upon this question and motion has there failed.)

To which ruling of the Court in refusing to strike out said p

graph 808 on page 154 of the rules, paragraph 819 on page 167, and the portion of paragraph 818, on page 165, the defendant excepted, and prays the Court to sign and seal this its thirty-first bill of exception, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

(Mr. Keedy:) The motion included all of the three paragraphs read and I would like to make a motion to each paragraph separately—motion to strike out each one of the rules separately

Whereupon the Court overruled the said motion, and the defendant excepted, and prays the Court to sign and seal this its thirty-second bill of exception, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

Whereupon the plaintiff rested.

152 And the defendant to sustain the issues joined on its part, offered the following testimony:

THOMAS STEWART, a witness of lawful age, produced in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

(By Col. Pearre:)

Q. What is your full name?
A. Thomas R. Stewart.
Q. What is your business?
A. Master Mechanic of the Baltimore and Ohio at Cumberand.
Q. How long have you been engaged in the railroad business?
A. About twenty-six years.
Q. Do you recall, Mr. Stewart, the taking of some photographs of the yard there in connection with the cinder pit?
A. Yes, sir.
Q. Were you there at the time of the accident in Cumberland?
A. Yes, sir. I came to Cumberland the 15th of April.
Q. Occupying the same position you do now?
A. Yes, sir.
Q. Did you know the condition of the surroundings—the condition of the cinder pit and surroundings at the time of June 23rd, 1913?
A. Yes, sir.
Q. Will you state whether or not it was similar to that when the photographs were taken?
A. Yes, sir; same thing.
Q. Similar?
A. Yes, sir.

(Cross Examination waived.)

153 H. W. CLARK, a witness of lawful age, produced in of the defendant, being duly sworn, testified as follow

Direct examination.

(By Col. Pearre:)

Q. What is your name?
A. H. W. Clark.
Q. Where do you live?
A. Cumberland, Maryland.
Q. What is your business?
A. Photographer.
Q. How long have you been photographing?
A. About thirty years, I think.
Q. Did you take some photographs for the Baltimore an Railroad Co.?
A. Yes, sir.
Q. Of this cinder pit?
A. Yes, sir.
Q. Will you please look at photograph now shown you "December, 1913—B. & O. No. 1," and state whether you to photograph?
A. Yes, sir.
Q. Is that a fair presentation and a fair representation conditions at the time it was taken?
A. Yes, sir.

(Col. Pearre:) Offers photographs marked "B. & O. No. "B. & O. No. 3, December 13th, 1913," and also two phot marked "B. & O. Feb. 5, 1914." Nos. 5 and 6. Also one "B. & O. No. 4, December, 1913." Nos. 1, 2, 3 and 4 were a at the same time. It is admitted that all the photograp mentioned are a fair representation of the conditions at t they were taken.

Q. Please look at photograph now shown you marked "I ant No. 7," and state whether you took that photogr
154 A. Yes, sir.
Q. Is that a fair representation of what it shows?
A. Yes, sir.
Q. When was it taken?
A. Feb. 27th—marked "Defendant No. 7, February 27th,
Q. Were you there and took this?
A. Yes, sir.
Q. Please state what it covers?

(Objection; objection sustained; Court ruling that he coul out the objects.)

Q. State what it shows?
A. It was taken from the south side of the cinder pit looki
Q. How many lights did you see?
A. About four that I saw.

COPY B

Q. Four that you remember?
A. Yes, sir.
Q. Did you see any others?
A. I saw some others a little further away—yes, sir.
Q. I understood you to say that they were correct representations of the views that they show?
A. Yes, sir.

Cross-examination:

(By Mr. Doub:)

Q. As I understood you, you only pointed out three places—one at the west end, one at the middle on the north side and one at the east end of the coal tipple?
A. I think there were two on the north side.
Q. If there were the pictures would show it?
A. Yes, sir. I think there are two. (Witness looks at pictures.) There are. The pictures already show one, that show two—
155 here is one that shows four—here is first one at the west slightly towards Cumberland—a little northwest showing the tool house and the tracks leading from the cinder pit down to the round house.
Q. Please look at photograph now shown you, Mr. Clark, and state whether you took that??
A. Yes, sir.
Q. When?
A. 27th of February.
Q. 1914?
A. Yes, sir, 1914.

(By Mr. Doub:)

Q. What is number of that?
A. "Defendant No. 8, Feb. 27, 1914."
Q. And you were down there when you took these photographs?
A. Yes, sir.
Q. Did you observe, Mr. Clark, the lighting arrangements of the cinder pit with reference to arc lights?
A. Well; yes, sir.

(Objection.)
(By Mr. Doub:) It is only admissible with proffer. What is the proffer?
(By Col. Pearre:) To show that it was in the same condition.

Q. Did you observe the lighting arrangements of the cinder pit to get them in the photograph?
A. Yes, sir.
Q. Will you please state what you observed with reference to the number of lights and what the character of the lights was you saw, that is, I mean the place for the lights? Where they were located—where they were?
A. There was one at the west end of the cinder pit along by the

UND CLOSE IN CENTER

tracks right opposite to the pit, and there was one over here
156 (indicating), just opposite to it on the east end of the tipple.

Q. How with reference to cinder pit?

A. East end of the cinder pit.

Q. Where are the others?

A. There is one on the north side of the cinder pit there and one on the north side of the cinder pit here——

(By Mr. Doub:) He is testifying from what he saw and not from the pictures.

end of the pit and there is one at the east end of the pit and there is one on the north side and there is another on the north side.

Q. That is not at the cinder pit. Is that not way off in the distance, Mr. Clark?

A. No, sir; I do not think so.

Q. I see that it is so little, would that not indicate that it is far away?

A. No, sir. I think that it is on the north side of the cinder pit.

Q. Do you remember seeing that?

A. Yes, sir.

Q. Mr. Clark, look at this picture, where was that taken from?

A. Taken from the south side of the pit looking north.

Q. Does that show the tracks on the south side of the cinder pit?

A. It shows the tracks on the south side of the cinder pit.

Q. You cannot see them, can you?

A. No, sir.

Q. Are there a number of tracks on the side of the cinder pit?

A. Yes, sir.

Q. And that conceals them, does it not?

157 A. Well, I cannot see them.

Q. Does that show the tracks on that picture? (Witness given another picture.)

A. Yes, sir. This was down lower.

Q. This picture was taken down near the level of the tracks?

A. Yes, sir. Nearly.

Q. That makes it appear that the cinder pit was on the level with the hump when it is not?

A. Well, it is nearly even there.

Q. But that is not a fact from this picture?

A. Well, there is a space there.

Q. You say that there is a large space there?

A. Yes, sir.

(Objection to this as argument and witness is dismissed.)

W. P. STARR, a witness of lawful age, produced in behalf of the defendant, being duly sworn, testified as follows:

Direct examination:

(By Col. Pearre:)

Q. What is your name?

A. W. P. Starr.

COPY BOUND

Q. Where do you live?
A. Philadelphia.
Q. How long have you lived in Philadelphia?
A. Have been located there since last October.
Q. What is your business and occupation?
A. Civil engineer.
Q. How long have you been a civil engineer?
A. Eight years.
158 Q. At what are you employed now?
A. Asst. engineer in Department of City Transit of Philadelphia.
Q. How long have you been employed there?
A. Since last October.
Q. Where were you employed before that and in what capacity?
A. With the Baltimore and Ohio Railroad as resident engineer.
Q. Where?
A. At Cumberland, Maryland.
Q. How long were you there?
A. About one year in Cumberland.
Q. Are you familiar with the cinder pit in the S. Cumberland Yard?
A. Yes, sir.
Q. What do you know about it?
A. I had charge of the construction of that pit and think I know pretty nearly everything about it that you could ask.
Q. You had charge of the construction of it?
A. Yes, sir.
Q. Will you please look at this and state what it is? Do you know it?
A. Yes, sir. I made it. It is a record showing the new work which was done in Cumberland while I was there and showing the new round house, track lay outs, machine shops and new engine terminal.
Q. That is new yard lay out?
A. Yes, sir.
Q. Including cinder pits?
A. Yes, sir—including cinder pit.
159 Q. Is it according to measurements or mere representations?
A. Yes, sir. It was made up of actual survey, both before the work was done and after it was completed.

(By the Court:)

Q. Drawn by scales?
A. Yes, sir.
Q. Is the scale on it?
A. Yes, sir. Scale is on it.

(Paper is then shown to jury.)

Q. Point out the round house first?

LOSE IN CENTER

A. This is the new round house that was just completed last year. This is the old round house. This is the turn table here and this the round house. (Indicating.)

Q. What is the next part of the equipment from the round house going east?

A. Next part in connection with the track is the cinder pit.

Q. Point that out.

A. This is the cinder pit here.

Q. Describe to the jury just what that is?

A. The cinder pit consists of two large concrete tanks with a track passing over the outside edge of each one. The tanks are two hundred feet long from center to center or 198 feet from inside. These little square places are steel towers and hold the overhead crane. On the north and south sides of the cinder pit are the fire tracks.

Q. What do you mean by fire tracks?

A. The tracks on which the engines come to have the cinders removed. Along this track is the pit which is beveled to the bottom. It runs down on an incline of forty-five degrees so that cinders will naturally slide down into the pit so that they can be taken up by these buckets. Then they slide along a carrier, which places the cinders into the cars which are located on the centre track. The pit is symmetrical and beveled on both sides and both north and south tracks of the pit are used for the same purposes.

160 Q. Point out the next part of the equipment north of that?

A. Just north of the cinder pit is what we call the hump track. It is an elevated track. It is practically six or eight feet higher than the cinder pit. That is used as a storage track for the coaling tipple. The coal cars are brought up on this track and placed there and the track is so graded as on an incline so that when you want to bring cars under the coal tipple that they can be dropped down by gravity after the brake is released and for that reason the hump track is built on an incline.

Q. Going east what?

A. Going east we have the coal station. That is used for coaling engines.

Q. You said it was 198 feet?

A. Yes, sir; 198 feet.

Q. What is the width?

A. The crane is 58 feet from rail to rail.

Q. You mean the overhead structure?

A. Yes, sir. The outside.

Q. What is under this space? What is it filled with?

A. Water.

Q. What is under the engines between the side tracks and the cinder tracks?

A. Water.

Q. Now going east?

A. This represents the coaling station. The cars run down here and the coal is carried up in the receptacle that is so constructed that it drops down by gravity into the pockets——

COPY BOUND

(By the Court:)

Q. Why is this description necessary, if it has no relation to the case?

(By Col. Pearre:) It is necessary.

—There are spouts that supply engines on any one of these five tracks passing along the coaling station. Engines can be coaled here on the cinder pit from the north side and the track on
161 the west side of the first ready track. The engines can be coaled on any one of these tracks.

Q. Trace the tracks down from the round house.

A. This circle represents the turn table and that can be turned to line up with any one of these tracks from the round house.

Q. The ready tracks leave the round house in which direction?

A. They leave the round house going eastwardly. A distance of about 200 feet from the round house they have a switch which allows another track to run off of the ready track and from the point they have two ready tracks. They go east one passing by the coaling station and go east for a distance of one thousand feet or more and then this switch carries the engines out on one single track which goes to the east end of the yard.

(By the Court:)

Q. There are no points of the compass shown on the plat are there?

A. No, sir; but north is up at the top.

Q. Then two ready tracks go east past the cinder pit?

A. Past the cinder pit—yes, sir.

Q. And go down here where they change and switch into one track and go on east, is that right?

A. Yes, sir.

Q. How many tracks are there south of the cinder pit entirely clear of the cinder pit?

A. Two tracks—one on the south and this one—then there is a third track which passes over a small portion that is really part of the cinder pit.

Q. Is that dry or wet pit?

A. Dry pit. That simply has five buckets in it and yard engines used in the yard are taken over there to have the ashes pulled out and they are taken up by the small buckets.

Q. There are two ready tracks south of the cinder pit?

162 A. Yes, sir; two.

Q. Can you coal from either one of the two ready tracks?

A. Yes, sir; from the north one of the two ready tracks.

Q. What is the distance from the east end of the round house?

A. From the center of the turn table to the west end of the cinder pit is six hundred and forty feet.

Q. What is the distance between the east end of the cinder pit and west end of the coal tipple?

A. One hundred and ten feet.

CLOSE IN CENTER

Q. That is the east end of the cinder pit and the west end of the coal tipple?
A. Yes, sir.
Q. And that distance is one hundred and ten feet?
A. One hundred and ten feet—yes, sir.
Q. What are those dotted lines?
A. They show what at one time was an old "Y" track, but it was removed before this new work could be done.
Q. What had become of the old "Y" track when this cinder pit was put in there?
A. They had it taken out before this cinder pit could be completed.
Q. Are there any tracks there now?
A. No, sir. The dotted lines show the tracks that had been there.
Q. Before the cinder pit was put in?
A. Yes, sir; before the cinder pit was put in.
Q. Were they there on June 23rd, 1913?
A. No, sir; they were not.
Q. Do you know how the cinder pit was lighted?
A. There was a light between the two southernmost tracks of the cinder pit and west of it a distance of about thirty feet from the pit.
163 Q. What kind of a light?
A. An arc light.
Q. Thirty feet west of the west end of the cinder pit?
A. Yes, sir.
Q. What was the height of it?
A. Thirty-five or forty feet approximately.
Q. Did you construct the lights?
A. No, sir; I simply located the place where they were to be.
Q. You simply picked out the location?
A. Yes, sir; the location. I know they are flaming arc lights.
Q. Were they located where you designed them to be located?
A. Yes, sir. There was another at the east end of the pit then overhead. There was another light on the north side of the pit about 70 feet west of the east end and was as close to the overhead structure as we could place it.
Q. Same kind of a light?
A. Yes, sir. And there was another light about one-third of the distance from the coaling station between the coaling station and the east end of the pit of the same character.
Q. How far would that be from the east end of the cinder pit?
A. One hundred and seventy feet, approximately.
Q. Same character?
A. Yes, sir.
Q. Do you know the character of these lights?
A. No, sir; not positively.

(By Juror:)

Q. How high were the lights?

COPY BOUND

A. Between thirty and forty feet.
Q. Look at that photograph that has been placed in evidence and state whether that is a fair representation of the situation?
164 A. Yes, sir; that is a very good representation.
Q. How many lights in all were there over the cinder pit?
A. Four lights—four arc lights very close to it.
Q. State at what portions of the cinder pit or near what portions of the cinder pit with reference to the points of the compass they were?

(By the Court:) He stated all that.

Q. Had you said there were four?
A. Yes, sir.
Q. Did you point out four?
A. Pointed out four; yes, sir.
Q. There is an overhead crane you spoke of?
A. Yes, sir.
Q. Do you know if there are any lights on the overhead crane?
A. I do not know about that. There must be as they are operated after night.

(Leave is asked and granted to recall the witness for other purposes if he is needed.)

Cross-examination.

(By Mr. Doub:)

Q. As I understand it, between the south and north side of this cinder pit right next to the first southern track and extending northwardly there is a drop of how many feet?
A. Well, approximately on the north about six feet.
Q. Does it drop down immediately?
A. It slopes down. There is about eight feet from the center of the track to the edge of the pit, and then there is just a natural slope to the center of the pit.
Q. In the pit itself—take the south side, the first of the south tracks is on the concrete of the cinder pit, is it not?
165 A. Yes, sir.
Q. What is the depth right between that track?
A. Three or four feet.
Q. It slopes down?
A. Yes, sir; from there to the full depth of the pit.
Q. Which is about nine feet?
A. About eight feet.
Q. When did you make this plat?
A. I made it after the work was completed.
Q. After you had completed the work?
A. Yes, sir.
Q. How does it come you did not put the location of the lights on the plat? That was part of the work?
A. Well, yes.
Q. Is that not part of the cinder pit?

LOSE IN CENTER

A. Not part of the cinder pit, but part of the yard.
Q. You located the lights as part of the yard?
A. Yes, sir; I located them.
Q. What did you put the lights there for?
A. To light the yard.
Q. For what purpose?
A. So that men could see at night.
Q. Yes, although you planned it yourself and located the yard and made up the plan of the whole yard, you did not locate the lights on that sheet?
A. No, sir. Not on that sheet.
Q. Did you put everything in it?
A. No, sir; several things; various wires and other things. It is complete as regards the tracks, buildings and all obstructions.
166 Q. Then it is complete as of the time that you made it?
A. It is complete except as to the lights and wires.
Q. Were the lights there at the time you made the plat?
A. Yes, sir.
Q. Why did you not put them on it?
A. Because I forgot them—they were not essential.
Q. Why did you forget it?
A. I do not know.
Q. Is it not a strange thing that you should omit to place the lights on the plat if you knew it was done?
A. No, sir.

(By Col. Pearre:)

Q. Was this a ground or aerial plan?
A. Ground plan.
Q. A ground plan would show the location of the post, would it not?
A. It would if they had been placed there on it.
Q. If you had not made a mistake you would have placed them there?
A. No; I would not.
Q. Then it was a mistake?
A. No, sir. I would not have placed them on there, anyway.
Q. Then you deliberately left them out?
A. Yes.
Q. How soon after the work was completed did you make this plat?
A. I started on it while the work was going on.
Q. When did you finish it?
A. I finished it sometime in September.
Q. What year?
A. 1913.

COPY BOUND

167 JOSEPH J. BARNETTE, a witness of lawful age, produced in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

(By Col. Pearre:)

Q. What is your full name?
A. Joseph J. Barnette.
Q. Where do you live?
A. Cumberland, Maryland.
Q. What is your business and by whom are you employeed?
A. Locomotive engineer, of the Baltimore and Ohio Railroad.
Q. How long have you been in the railroad service?
A. Twenty-seven years.
Q. How long have you been an engineer?
A. About twenty-four years.
Q. What were you before that?
A. Fireman.
Q. Anything else?
A. Not with the Baltimore and Ohio—three years firing.
Q. Three years firing and since that time have been engineer?
A. Yes, sir.
Q. Mr. Barnette, from where do you run?
A. Cumberland to Martinsburg at the present time.
Q. Do you know the South Cumberland yard of the Baltimore and Ohio?
A. Yes, sir.
Q. Do you know the cinder pit which has been spoken of here?
A. Yes, sir.
Q. How long have you known it?
168 A. Since the new yard has been put in operation and we went on that side.
Q. When was that—approximately?
A. I do not know exactly.
Q. About?
A. This last spring sometime that we started to run in there—early in the spring or latter part of the fall or winter sometime.
Q. Do you mean in the spring of 1913?
A. Yes, sir—1913.
Q. Tell the jury if you know when that pit was put in operation?
A. I could not say exactly. I remember of changing over to that side. We had fire tracks on the opposite side and then changed over. I do not know when.
Q. You are familiar with that ash pit, you say?
A. Yes, sir; I go up by it.
Q. When did you see it last?
A. I came in on the 26th of Feb.—on the night of the 26th—that was the last time I saw it.

CLOSE IN CENTER

Q. Will you please state, Mr. Barnette, whether you have any official connection with the company?

A. I was an examiner on the book of rules from April until October. I operated in Baltimore.

Q. For what divisions?

A. Cumberland Division—east end.

Q. Any other official capacity?

A. Member of the Divisional Safety Committee in connection with the General Committee for about eighteen months.

Q. What are its general duties?

A. Of the safety committee?

Q. Yes?

169 A. To inspect the general condition of the yards, look out for anything that might cause an accident and make a report and try to correct it.

Q. Will you please state to the jury whether in your opinion the cinder pit in the South Cumberland yard is a safe or a dangerous device?

(Objection on ground that he is not qualified; objection overruled.)

A. Safe. I consider it a safe proposition.

Q. Can you state, Mr. Barnette, what in your opinion would be the effect of an effort to protect that cinder pit by guard rails or barriers?

A. It would interfere with the working of it and would be a menace to the men working there and with the men getting on and off the engines.

Q. Can in your opinion the cinder pit be operated for the purposes for which it has been designed if there were any guard rails or barriers there?

A. No, sir.

Q. Have you seen any other cinder pits similar to this one?

A. Not filled with water. There is one at Sir Johns Run and one at Brunswick.

Q. How are they constructed?

(Objection; objection sustained.)

Q. What is the nature of the cinder pits at Brunswick and Sir Johns Run?

A. They are excavated pits, but are dry—they are not filled with water—they are about the same depth.

Q. They are not filled with water?

A. No, sir.

Q. Similar in other respects?

A. Yes, sir; according to depth and size.

(Objection as to this as a custom of the defendant.)

170 (By Col. Pearre. We proffer to show that the custom of other roads is similar.

(Objected overruled; it is admitted.)

Q. Mr. Barnette, please state whether those cinder pits had any guard rails, and if so, what you know about it?

A. No, sir. The one at Sir Johns Run had a guard rail and the Safety Committee ordered it taken down.

Q. How about Brunswick?

A. The one at Brunswick never did have any guards around it.

Q. Do you know how the cinder pit at Cumberland is lighted?

A. Yes, sir. Located at that particular yard there are four arc lights directly above the pits.

Q. Where are they located?

(Objection.)

(By Col. Pearre:) We proffer to show that the lights were there and burning that night.

(Admitted with proffer.)

A. There are two at the east end, one at the center and one at the west end—and four incandescent lights on the little house that works the electric crane to light the ashes.

Q. Will you please state, Mr. Barnett, to what crew the front brakeman belongs—the engin crew or the train crew?

A. The train crew.

Whereupon the following question was asked:

Q. Mr. Barnett, please state to the jury whether in your opinion a tin cup is a necessary part of the equipment of an engine?

To which question the plaintiff objected, and the Court sustained the said objection and refused to permit the question to be asked and the testimony to be given in evidence, whereupon the
171 defendant excepted, and prays the Court to sign and seal this its thirty-third bill of exception, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the aforegoing bill of exceptions, which is hereby made a part hereof as fully as if *they* were here incorporated *and* the following evidence was given:

Whereupon the following question was asked:

Q. Mr. Barnette, please state to the jury—say drinking cup—whether that is a necessary part of the equipment of an engine?

To which question the plaintiff objected, and the Court sustained the said objection, and refused the question to be asked and the testimony be given in evidence, whereupon the defendant excepted, and prays the Court to sign and seal this its thirty-fourth bill of exceptions, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the aforegoing bill of exceptions, which is hereby made a part hereof, as fully as if the same were here incorporated, the following evidence was given:

Whereupon the following question was asked:

Q. Mr. Barnette, do you know from your experience as a railroad man what constitutes the necessary equipment of an engine?

To which question the plaintiff objected, and the Court sustained the said objection, and refused to permit the question to be
172 asked and the testimony to be given in evidence, whereupon the defendant excepted, and prays the Court to sign and seal this its thirty-fifth bill of exceptions, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the aforegoing bill of exceptions, which is hereby made a part hereof as fully as if the same were here incorporated, the following evidence was given, and the witness further testified:

Cross-examination:

(By Mr. Wagaman):

Q. Mr. Barnette, when did you last see this cinder pit?
A. On the evening of the 26th of February or the night.
Q. When did you first examine it for the purpose of being able to testify in regard to it?

(Objection; question changed.)

Q. Have you examined the cinder pit for the purpose of being able to testify about it?
A. Yes, sir.
Q. When did you first do that?
A. That was two or three weeks ago—about a week before the trial in Cumberland.
Q. That trial took place when in Cumberland?
A. I do not know exactly when.
Q. What month? Last month?
A. In February—last month—yes.
Q. Up to that time you had not given particular attention to it?
A. Outside of going by it every night. I came right down by it every night.
173 Q. At the other trial were you asked this question, "How often did you see it?"
A. No, sir. I think I said I walked by it on a number of occasions, but not to give particular notice to it until I walked down there lately.
Q. That was about a week before the trial?
A. Yes, sir.
Q. Did you say at the trial in Cumberland that you walked by it, but not to take particular notice?
A. Not to take particular notice.
Q. Were you asked this question, "Did you see it at night?"

A. Yes, sir.
Q. Did you not say you had not?
A. Yes, sir; I had.
Q. Had you ever taken particular notice of it at night until you went there to examine it just prior to the trial at Cumberland?
A. Not particular notice—just walking by it every night as we would come in and out.
Q. When you spoke about the lights that you testified about, you meant the lights that are there now or were there when you saw it?
A. Yes, sir.
Q. And you were only speaking about that time?
A. Yes, sir. Positively—I cannot speak about them being there at any other time—but when I did see them they were there and all right.
Q. But you cannot testify as to prior to that?
A. No, sir—but when I did they were all burning.

174 W. L. TROUT, a witness of lawful age, produced in behalf of the defendant, duly sworn, testified as follows:

Direct examination:

(By Col. Pearre:)

Q. Where do you live, Mr. Trout? What is your full name?
A. W. L. Trout. Cumberland, Maryland.
Q. How long have you lived there?
A. Since November 8th.
Q. What is your business and your present position?
A. General foreman of the Western Maryland Railway.
Q. How long have you been in the railroad business?
A. Since 1891—Jan. 1st, I believe.
Q. In what capacity have you served?
A. I have served in about all the capacities from an engineer's standpoint on the Pennsylvania and also on the Western Maryland as general foreman.
Q. Where did you begin your career?
A. At Altoona.
Q. At what?
A. Engineer helper.
Q. What next?
A. I was put along the line as machinist and foreman.
Q. Until now you are general foreman?
A. General foreman; yes, sir; of the Western Maryland.
Q. Are you familiar with cinder pits as part of the railroad equipment?
A. Yes, sir.
Q. Have you seen the cinder pit of the Baltimore and Ohio Railroad at Cumberland in the South Cumberland Yard?
175 A. Yes, sir.
Q. You went there for the purpose of looking at it.
A. Yes, sir.
Q. When?

A. Three or four weeks ago. I do not know the date.

Q. Do you know of any other similar cinder pits?

A. One at Maryland Junction on the Western Maryland, one at Staunton on the Delaware, Lackawanna and Western and one at South Cumberland.

Q. Please state, Mr. Trout, whether the cinder pit of the Baltimore and Ohio Railroad, at South Cumberland Yards of which you are speaking is modern and up-to-date?

A. Yes, sir.

Q. Please state whether it is of modern and up-to-date and improved design and construction?

A. It is of modern design.

Q. And method of operation?

A. Yes, sir.

Q. Will you state whether or not the cinder pits of which you have spoken of similar design are protected by guard rails and barriers?

A. They are not.

Q. Did you notice the lighting arrangement of this cinder pit?

A. Yes, sir.

Q. Will you please state what lighting arrangements are there?

A. I noticed four arc lights there—two on each side of the pit and four incandescent lights on the operator's place.

Q. You saw four incandescent lights?

A. Yes, sir.

(Objection.)

176 (By Mr. Doub:) There is no denial of the fact there are four lights there now.

Q. Will you please state whether that pit was adequately lighted?

A. Yes, sir; I think so.

Q. Will you please state whether in your opinion, Mr. Trout, that pit could be operated for the purposes for which it is designed if there were guard rails or barriers up about there?

A. No, sir. It could not.

Q. What would be the effect?

A. The barriers would be in the way of the men cleaning the fire. They would strike their hands against it. It would also be in the way of the men getting upon the engines. Also the hostlers.

Q. Will you please state from your familiarity with the pit whether that pit is a reasonably safe pit in that yard?

(Objection, objection overruled.)

A. Yes, sir.

Q. With reference to its relative location taking into consideration other parts of the equipment in the yard, will you please state whether it is properly located?

A. Yes, sir; very well located.

Q. Made to modern and improved methods?

A. Yes, sir.

Q. In railroad practices?

A. Yes, sir.

Q. Do you know the proper equipment and necessary equipment for an engine on a tour of duty?
A. Practically so.
Q. What do you mean by practically so?
A. I may not be able to state every article on the list.
Q. Do you know what the necessary equipment of an en-
177 gine is?
A. Yes, sir.

Whereupon the witness was asked the following question:

Q. Is a drinking cup a necessary part of that equipment?

To which question the plaintiff objected, and the Court sustained the said objection, and refused to permit the said question to be asked and the testimony to be given in evidence, whereupon the defendant excepted, and prays the Court to sign and seal this its thirty-sixth bill of exceptions, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the aforegoing bill of exceptions, which is made a part hereof as fully as if the same were here incorporated, the following evidence was given, and the witness further testified:

Cross-examination:

(By Mr. Doub:)

Q. Is the cinder pit at Maryland Junction a dry pit?
A. Yes, sir.
Q. Where is that located?
A. At Maryland Junction terminal.
Q. Where is that?
A. One and one-half miles from the central station at Cumberland.
Q. Does that pit straddle the track?
A. Yes, sir.
Q. Did you ever see this pit at night?
A. The pit at Cumberland?
Q. Yes?
A. No, sir.
178 Q. How could you tell whether or not it was adequately lighted?
A. I could not say that it was adequately lighted. I merely know that the lights were there.
Q. You did not mean that?
A. No, sir. Not in that sense.
Q. Does this cinder pit need guard rails?
A. No, sir.
Q. Why?

A. It could not be used for the purposes for which it was constructed.

Q. Why?

A. It would be in the way of the men.

Q. Why?

A. It would interfere with their work.

Q. How near the tracks would they be—the guard rails, how near would they be?

(Other question left unanswered.)

Q. Where would you have them put?

A. I would not have them put at all.

Q. In order to interfere with the men how near would they have to be?

A. They would have to be distant away not to interfere.

Q. How near? One foot, two feet, three feet, four feet, or five feet away from the tracks?

A. Six feet—possibly.

Q. Would they interfere six feet away?

A. I do not know.

Q. If they were six feet away why would it be a menace?

A. If they were six feet away it would be possible then to fall in—they would not be any good.

179 Q. They could put a guard rail up at the end of the pit six feet from the side?

A. But it would not then be protected all along the end of the pit.

Q. But you would still have the 198 feet protected along the side with guard rails?

A. Yes, sir.

Q. You could protect 198 feet and would only let six feet unprotected?

A. No, sir.

Q. Do you simply add to the danger at the ends while you only diminish it at the sides?

A. That is right.

Q. Your proportion of increased safety would be in proportion two times 198 to two times six?

A. No, sir. A man would have to go by the guard rail on the pit, thereby increasing the danger of falling in.

Q. Why would he do that?

A. At his work.

Q. You mean at night?

A. At any time.

Q. He would not walk out at the end, would he?

A. He might.

Q. You assume that the guard rail could be placed along the side?

A. Yes, sir.

Q. And that that guard rail would not be a menace to the men?

A. Not if placed a sufficient distance away. I know of no good reason why it should be placed there.
Q. Would they not be an aid to the men?
A. I do not know.

180 Redirect examination:

(By Col. Pearre:)

Q. You say that guard rails could be put along there. Would they be practicable as a means of safety?
A. I would not consider them so; no, sir.

JOHN R. ALEXANDER, a witness of lawful age, produced in behalf of the defendant, being duly sworn, testified as follows:

Direct examination:

(By Col. Pearre:)

Q. What is your name.
A. John R. Alexander.
Q. Where do you live?
A. Altoona, Pennsylvania.
Q. How long have you lived there?
A. About twelve years.
Q. Where did you live before you went there?
A. Pittsburg, Pennsylvania.
Q. What is your business—and occupation and by whom are you employed?
A. With the Pennsylvania Railroad. At the present time general road foreman of engines of the Eastern Pennsylvania Division.
Q. How long have you been in the employ of the Pennsylvania?
A. About twenty-five years.
Q. Does that cover your whole railroad experience?
A. Yes, sir.
Q. How old are you?
A. Fifty-nine—going on sixty years.
181 Q. Then you have been in the railroad service since you were young?
A. Yes, sir.
Q. In what capacities have you served?
A. As locomotive fireman, engineer, air brake inspector, motive power inspector and general foreman of engines.
Q. That is your present position?
A. Yes, sir.
Q. Does your position give you an opportunity to observe the construction and operation of cinder pits?
A. Yes, sir.
Q. Have you seen the cinder pit of the Baltimore and Ohio Railroad, in the South Cumberland Yard?
A. Yes, sir.
Q. When did you see it?
A. Last Saturday—March 28th (Meant for Feb. 28th).

Q. Are you familiar with the construction of cinder pits in a general way?

A. Yes, sir.

Q. Do you know of any other cinder pits of a similar kind and character to that of the Baltimore and Ohio Railroad at Cumberland?

A. There is one at Bloomington, Ill., one at Scranton, Pa., and one on the Western Maryland Railway.

Q. Will you please state whether in your opinion, the South Cumberland cinder pit is safely located with reference to the other parts of the equipment in the yard?

A. Yes, sir; I consider it so.

Q. Will you state whether that cinder pit is of modern and improved construction and design?

A. It is.

Q. Will you state, if you know, Mr. Alexander, whether the operation of such cinder pits is of modern character and design?

182 A. They are.

Q. Will you please state whether from your information and your opinion the cinder pit at Cumberland is of safe construction, design and operation?

A. It is.

Q. Will you state whether the cinder pits of which you have spoken are protected by guard rails or barriers of any kind?

A. I know of no cinder pit that is protected as you suggest.

Q. Would it be practicable considering the design and purpose for which such cinder pits are built and operated to protect them by such guard rails and barriers?

A. No, sir; not as I understand the question of guard rails.

Q. What would be the result of placing guard rails or barriers in such a position as that they might be a protection?

A. They would interfere with the operation of the cinder pit and the men engaged in that service.

Q. Did you notice the scheme or plan of lighting of the cinder pit?

A. I noticed the equipment for lighting; yes, sir.

Q. I mean the equipment for lighting. I do not mean as to whether or not they had lights on them. Did you notice that?

A. Yes, sir.

Q. Was it adequate or otherwise?

A. I consider it adequate.

Q. I believe you went to Cumberland at our request to look at this—at the request of the authorities of the Baltimore and Ohio on last Saturday?

A. Yes, sir.

Cross-examination.

(By Mr. Wagaman:)

Q. Your home is at Altoona, Pennsylvania?

A. Yes, sir.

183 Q. Who sent you down here?
A. I came at the request of our general superintendent.
Q. Of the Pennsylvania Railroad?
A. Of the Pennsylvania Railroad.
Q. Have you mentioned all the cinder pits of which you have any knowledge?
A. Yes, sir; any direct knowledge.
Q. One at Bloomington, Illinois?
A. Yes, sir.
Q. On what system?
A. Rock Island.
Q. One at Scranton?
A. Yes, sir; on the Delaware and Lackawan-a.
Q. One on the Western Maryland Railway?
A. Yes, sir.
Q. And this one at Cumberland?
A. Yes, sir.
Q. You have been forty-five years with the Pennsylvania Railroad?
A. Yes, sir.
Q. That is a great system?
A. Yes, sir. As I understand, it is one of the modern systems.
Q. You regard it as one of the best?
A. I am not able to say that.
Q. You do not know of a single wet pit on the Pennsylvania Railroad?
A. No, sir.
Q. You have not seen this cinder pit at Cumberland at
184 night?
A. No, sir.
Q. You think it would be impracticable to put guard rails up there to protect persons from falling into that pit?
A. I do.
Q. That is because the rail would interfere with the operation of the men moving around there?
A. Yes, sir. Cleaning engines and getting up and down off of the engines.
Q. You say the construction of this pit is modern?
A. Yes, sir.
Q. And you saw at some places a guard rail?
A. Yes, sir. A rail on the outside of the girders.
Q. That acts as a protection to persons walking at that point?
A. No, sir.
Q. That rail does it or not act as a protection for the men?
A. It might not because a man might not be tall enough to hit it.
Q. How high is it from the ground?
A. About five feet, but I have made no measurements.
Q. Assuming that the rail is five feet high, would it be any protection?
A. It might not be.

Whereupon the following question was asked:

Q. And there are some of the guard rails along that pit, are there?

To which question the defendant objected, but the Court overruled the said objection and permitted the question to be asked and the testimony to be given in evidence, whereupon the defendant excepted, and prays the Court to sign this its thirty-seventh bill of exceptions, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

185 After offering the evidence set out in the aforegoing bill of exceptions, which is made a part hereof as fully as if the same were here incorporated, the said question was asked and the following evidence given:

A. Yes, sir.

And the witness further testified:

Q. How many on the south side?
A. Every third one.
Q. Every third span?
A. Yes, sir.
Q. And still it would be impracticable to put guard rails in the other spans?
A. I think so.
Q. Even if they could be removed?
A. Then there would not be any there.
Q. You do not see how it could be moved out of its position?
A. I would not call that a safety rail.
Q. If it was mortised?
A. I would not call that a safety rail.
Q. There is no danger of falling in while the engine is there?
A. A man might fall in, for he walks about there anywhere.
Q. A man that comes up there with the engine to pull ashes knows that the pit is there?
A. I thought you meant an outside man.
Q. No, with the engine?
A. An outside man going there with the engine there would run into the engine. He would run into the engine and fall into the pit.
Q. Your objection to putting guard rails there is that the men could not rake out the ashes?
A. No, sir; not with a guard rail.

186 Q. An engine draws up along the south track to have the ashes removed. The fireman raises the rail, lays it on the ground, draws the ashes out of the engine into the pit and goes away with the engine after putting up the rail. Is that not practicable?
A. No, sir. As fast as that engine goes away another engine would come in and the rail would be down all the time.
Q. But there would also always be an engine there in that length of the pit?

A. No, sir.

Q. So you can not perceive any way in which a guard rail would be any protection to men walking about there at night?

A. No, sir.

Q. A well full of water 200 feet lying in the midst of a place where men are working day and night is a reasonably safe place?

A. Yes, sir; as that pit is made.

Redirect examination.

(By Col. Pearre:)

Q. My brother has conceived a plan by which a movable rail could be placed there.

(Objection; no ruling; another question asked.)

Q. It has been suggested, Mr. Alexander, that protection might be furnished by a movable rail. When that rail is taken down that would destroy the safety?

A. Yes, sir.

Q. Would that prevent a man from walking along the engine and falling in beyond?

A. No, sir.

Q. Are these iron pieces up there for protection?

A. They are for the design and strength.

Q. What are the open places for?

A. To put the engines there so that they may be operated properly.

187 Q. You were asked the question as to whether the Pennsylvania Railroad had any water pits like this. Will you please explain why the Pennsylvania Railroad has no water pits like this?

(Objection.)

(By Col. Pearre:) We offer to prove that there has been no recent construction of cinder pits on the Pennsylvania Railroad.

(Another question is asked.)

Q. Has there been any construction of cinder pits on the Pennsylvania Railroad System since this new design of water system has come into vogue?

A. There has not.

Q. Have you had any special experience or information in regard to cinder pits on the Pennsylvania Railroad?

A. I have.

Q. What was it?

A. As a member of a Motive Committee of the General Superintendent of Motive Power to look into that question—the question of the lay out of terminals.

Q. Including cinder pits?

A. Yes, sir. That committee of which I was a member made a study—

(Witness is told to tell what he knows.)

As a member of that committee, we make a study of all those factors and seen fit to recommend the use of wet cinder pits. We had recommended one like the pit at Bloomington, which has somewhat of a resemblance to the Baltimore and Ohio pit at Cumberland

Q. Substantially the same?

A. Substantially the same; yes, sir.

188 H. S. HUNTER, a witness of lawful age, produced in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

(By Col. Pearre:)

Q. Where do you live?

A. Philadelphia.

Q. How long have you lived in Philadelphia?

A. The last ten years.

Q. Where did you live before you went to Philadelphia?

A. Reading, Pa.

Q. What is your business and by whom employed?

A. I am now master mechanic. Employed by the Philadelphia and Reading Railroad.

Q. How long have you been employed by the Philadelphia and Reading Railroad?

A. Since 1870.

Q. How long in the railroad business?

A. Since 1870.

Q. With them all the time?

A. Yes, sir.

Q. Please state in what capacities you have worked.

A. I served as office boy and then an apprenticeship of five years as mechanic and then I wanted to be an engineer and started to braking and then firing and then a locomotive engineer, locomotive inspector, road foreman of engines and then as master mechanic.

Q. That is your present position?

A. Yes, sir.

Q. With the Philadelphia and Reading Railroad?

A. Yes, sir.

Q. Has your work brought you into contact with cinder
189 pits?

A. Yes, sir. They are under my direct charge in Philadephia.

Q. Have you seen the cinder pit of the Baltimore and Ohio Railroad Company at Cumberland?

A. Yes, sir.

Q. How did you happen to go there, Mr. Hunter?

A. I went there by the direction of our superintendent of motive power.

Q. To look at that pit?

A. Yes, sir; to look at that pit.

Q. When you got to the yard, when did you see the pit?

A. At night time.
Q. What was the character of the weather?
A. It was Sunday night, a little after ten o'clock.
Q. What was the character of the weather?
A. Snowing and blowing hard.
Q. Was it a bad night or a good night?
A. A bad night.
Q. From which side did you approach the pit?
A. I am not sure whether it was north or south. I came down rginia Ave., so far as the trolley cars run, then I walked down to e track from Virginia Ave., and passed through a gate and then wn to a shop and then went up to the ash pit.
Q. Was the ash pit lighted then?
A. It was the best lighted ash pit I have ever seen.
Q. Did you notice the number of lights?
A. No, sir. I didi not count the lights.
Q. Mr. Hunter, what is the character of the ash pits you have en and where have you seen them?
A. This is about the best I have ever seen.
0 Q. Have you ever seen any others?
A. I have seen the one at East Side, Philadelphia, and have ard of others.
Q. Is that the one that is under you supervision?
A. No, sir; only I have engines down there and I go down there e a week.
Q. Do you know of any cinder pit protected by guard rails?
A. I have twenty of them in my territory in Philadelphia and t one protected by guard rails.
Q. Will you please say whether from your knowledge and exrience this cinder pit here is of modern construction, design and eration?

(Objection; objection overruled.)

A. Yes, sir. And I have recommended that we build ash pits the same kind if we do build any.
Q. Is the method of operation modern?
A. Yes, sir.
Q. Please state from your knowledge and experience whether is cinder pit is properly located with reference to the other equipent in the yard?
A. Yes, sir. Well located.
Q. Is it a safe cinder pit?
A. Yes, sir.
Q. Will you state to the jury whether or not the placing of guard ils or barriers there movable or immovable such as has been sugsted here would be practicable or whether they would interfer with e operation of this cinder pit?
A. It is impracticable. It is out of the question. Where you have e movement of engines over the ash pit every minute or two it impracticable. Impossible.
Q. Why?

A. Because the men operating the ash pit and cleaning the fires in the engines they would be subjected to much delay and they could not handle the tools successfully.

191 Q. Would the guard rails be a protection or a menace to the men?

A. A menace.

Cross-examination.

(By Mr. Wagaman:)

Q. When did your superintendent of motive power send you to Cumberland?

A. I got a message from him last Saturday to go to Cumberland at once.

Q. What for?

A. To inspect the ash pit at that point.

Q. And then what?

A. And then report to the district claim agent at Cumberland.

Q. What claim agent?

A. I forgot his name.

Q. Did you report to the Claim Agent at Cumberland?

A. No, sir. I could not find him.

Q. Was that Mr. Harig?

A. Yes, sir.

Q. Then you reported to whom?

A. They told me Mr. Harig had gone to Hagerstown and that I should follow on to Hagerstown.

Q. Then you came here?

A. Yes, sir.

Q. You left home and went to Cumberland and then came here on this case?

A. Yes, sir; from the instructions of my superior officers.

Q. I understood you to say guard rails would cause too much delay in removing the ashes from the engines?

A. Yes, sir. You could not handle the tools at all right.

192 Q. If you would have a rail there and when you come in lay it down and get the ashes out, that would make too much delay?

A. Yes, sir. It is just as bad as with the rail out some one might fall into them.

Q. How would it be a menace?

A. You could not hold an engine. You would block up your railroads?

Q. Did you see the guard rails on this cinder pit?

A. No, sir.

Q. You saw the struts?

A. Yes, sir.

Q. And the uprights?

A. Yes, sir.

Q. The cross bars? There are no cross bars that run on an incline like this? (Indicating.)

A. Yes, sir.
Q. Did you see any struts extending from upwrights to uprights?
A. Yes, sir.
Q. Did you see extending four or five feet from the ground a trut from one upright to the other?
A. Yes, sir. There is a beam from every third one—from the foundation.
Q. They would prevent a man from walking into the pit at that particular place?
A. I think you could get into there as they are nearly even to the ground.
Q. If a man was walking up to that pit and walk against a beam would not that protect him?
A. If it was up high enough.
Q. There are some of them there?
193 A. Every third one, I think.
Q. What is impracticable to having one like that all along there?
A. It is out of all reason. You could not do it. You might just as well fence the canal to keep any one from walking into the canal and when boats come along remove it.
Q. Did you see anything there to prevent people from walking into it?
A. When I first came around I saw a little railing at the end.
Q. Did you see anything else that would warn people from stepping into the pit?
A. No, sir. I saw nothing.
Q. Would it be impracticable to put up signs there?
A. There is no necessity for that. If they were no near-sighted men there is no danger.
Q. Answer my question.
A. You could not put up signs. Anybody could see that the pit is big enough.

Redirect examination.

(By Col Pearre:)

Q. You went down at night in a snow storm?
A. Yes, sir.
Q. No warning or guard rails?
A. No, sir.
Q. And had never been there before?
A. No, sir.
Q. Did you have any difficulty about falling in?
A. No, sir.

194 Recross-examination.

(By Mr. Doub:)

Q. You lost your bearings?
A. Yes, sir. I did not know north, south, east or west.

(By Mr. Wagaman:)

Q. Did anybody go with you down there?

A. I met a boy and he walked down with me and I said, "There is the ash pit" long before I came to it. He was a little messenger boy.

W. C. KLINE, a witness of lawful age, produced in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

(By Col. Pearre:)

Q. What is your full name?

A. W. C. Kline.

Q. Where do you live?

A. Cumberland, Maryland.

Q. What is your profession?

A. Civil engineer. Western Maryland Railway.

Q. How long have you been employed by the Western Maryland Railway?

A. About four years.

Q. In what capacity are you employed?

A. I am now division engineer in charge on the Cumberland Division.

Q. How long have you been in the railroad service?

A. Eight years.

Q. Where were you engaged before you went with the Western Maryland?

195 A. When I graduated I went with the Pennsylvania and helped to build the tunnel under the East River and then worked there for about two years. Then I went to Nevada and worked about one years. Then I went down into Mexico and worked on the Harnman Lines for about one year and then I came to Cumberland.

Q. Have you been there ever since?

A. Yes, sir.

Q. What positions have you held?

A. I started at driving stakes and holding tape and was promoted as instrument man at the tunnel. When I worked as instrument man in Nevada and then came to Cumberland and started in as instrument man until we started to build the Connellsville Division and then I was appointed engineer of the same work there. Then I was appointed resident engineer at Cumberland.

Q. Has your work brought you in contact with cinder pits?

A. Yes, sir.

Q. Have you built any?

A. Yes, sir.

Q. Where?

A. I had charge of the building of the cinder pit at Western Maryland Junction west of Cumberland in West Virginia.

Q. What is the character of that pit as compared with that of the Baltimore and Ohio at Cumberland?

A. The character in general is about the same. In sequence it is the same. The ash pit comes in a different order.

Q. Is that a material difference?

A. No, sir.

Q. Does it affect in any way the general safety of the pit?

A. No, sir.

Q. Have you seen the cinder pit at Cumberland and noticed it in reference to the other equipment around the yard?

A. Yes, sir

196 Q. State to the jury from your knowledge and experience if that is a modern lay out there?

A. Yes, sir; that is a modern lay out. It was about the same as we built.

Q. From the lay out is that cinder pit of modern and safe design?

A. There is no point about there but where the latest devices were used and the latest methods of construction were used.

Q. Will you state to the jury whether that is a safe cinder pit.

A. We consider it safe. As an engineer I consider it a safe pit.

Q. Will you please state whether in your opinion that cinder pit could be operated for the purposes for which it was designed if it had guard rails or barriers such as have been suggested here?

A. The guard rails or barriers would have to be so far removed that they would not act as a guard.

Q. Why would they have to be removed?

A. Because of the men working there and men jumping on and off of the engines.

Q. To the men operating the engines or the hostlers or these working around there with reference to the cinder pit would such guard rails be a protection or a menace?

A. They would be a menace and a hindrance to the work.

Q. You said you built a similar pit over in West Virginia?

A. Yes, sir.

Q. Is that equipped with guard rails?

A. No, sir.

Q. Do you know of any cinder pit which is equipped with guard rails or barriers?

A. No, sir. I know of none.

Q. Did you notice the lighting scheme down there—the equipment for lighting?

197 A. Yes, sir. I noticed that there were four arc lights there and four incandescent lights on the traveling crane.

Q. How did you come to go there?

A. I first went there during the construction of the pit. We were constructing one at the same time and I went there for my own information to see how the Baltimore and Ohio was building their pits.

Q. How often have you been there?

A. Three or four times.

Q. When were you last there?

A. During the trial of this case in Cumberland during the first of February.

Q. At whose request?

A. At request of Mr. Norman, Asst. Claim Agent, I think of the Baltimore and Ohio.

Q. You say you have noticed the equipment for lighting. Is that a sufficient and adequate equipment for lighting?

A. I did not see it at night.

Q. I mean the arrangements for lighting?

A. Yes, sir. The arrangements are all right.

Cross-examination.

(By Mr. Doub:)

Q. You never saw this pit at night.

A. No, sir.

Q. You said the reason guard rails placed at the sides would be impracticable is that they would be too far away?

A. Yes, sir.

Q. Too far away for what?

A. For protection. There would be a space at the end.

Q. Could you not put a guard rail at the ends?

A. No, sir. You need the clearance distance.

Q. How much clearance distance do they now have?

198 A. I do not know. I did not measure it.

Q. Did you see it?

A. Yes, sir.

Q. How much is it?

A. I do not know.

Q. How much ought it be?

A. That structure to support that traveling crane ought to be five feet from the rail.

Q. What does the clearance distance have to do with supporting the structure?

A. They use rakes.

Q. How much ought the clearance be?

A. Five feet.

Q. Then the clearance distance between the pit and the track should be five feet?

A. Yes, sir.

Q. Then if the clearance distance in this case is less than five feet it is not properly constructed?

(Objection; objection sustained.)

Q. How far would it have to be to act as a protection?

A. Twelve feet from the rail. The solid barrier would have to be twelve feet from the rail. The guard rail would have to be five feet from the rail.

Q. There would be no difficulty about protecting the seven feet from the guard rail into the point where the clearance begins by an additional guard rail at the end would there?

A. It would probably interfere with the operation of the pit—the rakes and appliances.

Q. You only need five feet.

A. At certain points. These uprights only cover the space at intervals.

Q. The uprights only had to be five feet from the rail to give the proper clearance?

A. Yes, sir; for the engine.

Q. For the man too?

A. If that was a solid fence there five feet you could not work.

Q. So then you admit that if the guard rail were placed twelve feet from the track it would not be a menace to the men?

A. No, sir. It would not interfere with the men about the engine, because it would be too far away.

Q. What is the reason it could not have been built that way with the guard rail twelve feet from the edge?

A. You can build a fence anywhere. Nothing to prevent that. You could build it one hundred feet away, but it would not be a protection.

Q. It would be a protection to the extent of 198 feet long?

A. Yes, sir; but only one man in a hundred walks that way.

Q. Would it protect that man?

A. Yes, sir.

Q. Now that could be done by changing the position of the uprights by making them seven feet wider?

A. Yes, sir; that could have been done.

Q. As I understand you, you say that as an engineer that could have been done?

A. Yes, sir.

Redirect examination.

(By Col. Pearre:)

Q. You said that would not be any protection to the men?

A. No, sir. Because the men could walk through this avenue through the rail.

Recross-examination:

Whereupon the following question was asked:

(By Mr. Doub:)

Q. Could not part of that twelve feet be protected by a guard rail at the ends?

To which question the defendant objected, but the Court overruled the said objection, and permitted the said question to be asked and the testimony given in evidence, whereupon the defendant excepted and prays the Court to sign this its thirty-eighth bill of exception, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the aforegoing bill of exceptions, which is made a part hereof as fully as if the same were here incorporated, the said question was asked and the following evidence given:

A. Yes, you could close up that twelve feet, but you can not operate it.

And the witness further testified:

Q. You say part of the twelve feet?
A. You are talking about closing up seven feet of it. The rakes are seven feet long.
Q. They do not rake it at the ends do they?
A. Oh, yes.
Q. Could they close up any part of it?
A. Yes, sir. The entire pit.
Q. And not interfere with the operation?
A. Oh, yes; you would interfere with the work and appliances. You need twelve feet there to operate it and then the fence would be too far away.
Q. But the uprights do not interfere?
201 A. No, sir.
Q. The struts do not?
A. No, sir. They do not clean fire there where the struts are.
Q. They would have to clean the fires in that seven feet at the end?
A. No, sir.
Q. You could put a rail there then?
A. Yes, sir.

(By Col. Pearre:)

Q. Then you could fence the whole thing in that no one could get to it?
A. Yes, sir. You could fence a saw mill in that no one could get to it.

H. R. KIGHT, a witness of lawful age, produced on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

(By Col. Pearre:)

Q. Where do you live?
A. Mitchell, W. Va.
Q. What is your name?
A. Howard R. Kight.
Q. How long have you lived at Mitchell, W. Va?
A. Fourteen years.
Q. Fourteen years?
A. Fifteen years. I have not lived there fifteen consecutive years, however.
Q. What is your business?

A. Master Mechanic of the West Virginia Division of the Western Maryland Railway.

202 Q. How long have you been in the railroad business?

A. Going on twenty-six years.

Q. What positions have you occupied during that time?

A. Machinist, foreman, general foreman, master mechanic.

Q. That is the position you occupy now?

A. Yes, sir.

Q. Has your experience in railroading brought you into contact with cinder pits?

A. Yes, sir.

Q. And give you information about them?

A. At all times—yes.

Q. Are you familiar with cinder pit construction?

A. All the cinder pits that I have seen never had any guard rails around them.

Q. Are you familiar with the construction of them?

A. I am; yes, sir.

Q. Are you familiar with the construction of the cinder pit in Cumberland?

A. Yes, sir.

Q. When did you see it?

A. About four weeks ago and again last Sunday.

Q. How came you to see it?

A. I was requested by the Supt. to go down there and look at them.

Q. What superintendent?

A. Supt. Steiner of the Western Maryland.

Q. Had you noticed it before?

A. Yes, sir; I had been there.

Q. Have you any cinder pits under your control or charge at Ridgely?

203 A. Yes, sir.

Q. What is its design as compared with this?

A. Its design is exactly the same. It might be a little longer.

Q. Is it a dry pit?

A. Yes, sir.

Q. Will you please state whether the cinder pit of the Baltimore and Ohio at Cumberland is of modern construction and design?

A. It is.

Q. And of modern method of operation?

A. It is.

Q. Could the cinder pit of the Baltimore and Ohio at Cumberland be operated for the purposes for which it is designed if protected by guard rails or barriers?

A. No, sir.

Q. Would it be practicable?

A. No, sir.

Q. Do you know any cinder pits protected by guard rails or barriers?

A. No, sir.

Q. Is the pit at Ridgely protected by guard rails?
A. No, sir.
Q. Did you notice the equipment for lighting of the cinder pit of the Baltimore and Ohio at Cumberland?
A. Yes, sir.
Q. Was it adequate?
A. Yes, sir.
Q. Was it at night?
A. Several years ago I was there and noticed that it was a very well lighted yard, but I did not notice particular the cinder pit.
204 Q. Did you notice the location of the cinder pit with reference to the round house, the coal tipple, etc?
A. Yes, sir.
Q. Was it well located as to these?
A. Yes, sir.
Q. Was it properly located?
A. Yes, sir.
Q. Is it a safe cinder pit?
A. Yes, sir.
Q. Safe in construction?
A. Yes, sir.
Q. And in operation?
A. Yes, sir.

Cross-examination.

(By Mr. Wagaman:)

Q. You saw it about four weeks ago?
A. Yes, sir.
Q. That is the first time you saw it to take particular notice of it?
A. Yes, sir.
Q. Then you were requested to come there by the superintendent of the Western Maryland?
A. Yes, sir. I was called to go there by Superintendent Steiner, who said that he was called up by the Baltimore and Ohio to go there and examine it and testify as to the condition of the pit.
Q. You knew when you went there to examine it what you were to do?

(Objection; objection sustained.)

Q. You are of the opinion after having examined that pit that it could not be protected by guard rails?
205 A. No, sir. Not to be operated safely by all employees.
Q. Could it have been so arranged before this accident so as to have protected people from walking into it at night?

(Objection; objection sustained.)

Q. Mr. Kight, why would it not be practicable to place guard rails along the sides of that pit?
A. It would interfere with the workmen handling their fire rakes. They are on an average of eight to ten feet long. It would also interfere with the men getting on and off their engines.

Q. How high are those uprights?
A. Thirty or forty feet, I do not know exactly.
Q. How far must a person raking ashes from the engine have clear space?
A. There are different types of engines.
Q. The general type of the Baltimore and Ohio?
A. About five feet.

Whereupon the witness was asked the following question:

Q. Would it not be practicable in this open space on the south to have a wire gate suspended on weights to lift up and drop down?

To which question the defendant objected, but the Court overruled the said objection and permitted the question to be asked and the testimony to be given in evidence, whereupon the defendant excepted, and prays the Court to sign this its thirty-ninth bill of exception, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the aforegoing bill of exceptions, which is hereby made a part hereof as fully as if the
206 same were here incorporated, the said question was asked and the following evidence given:

A. Am I to understand at each end of the ash pit or on the side?

And the witness further testified:

Q. On the south side of this ash pit. You say it required five feet for the engines. Would it be practicable to have the wire gate or any light material to move up and down?
A. It could be done, but I cannot see from a safety standpoint that it would be any good.
Q. A gate there would not keep men from walking into the pit?
A. No, sir.

Redirect examination.

(By Col. Pearre:)

Q. State why it would not be any good?
A. Simply because it would be up all the time. There are engines passing there every five minutes in the day.
Q. Same at night?
A. Yes, sir. Same at night.

Recross-examination:

(By Mr. Wagaman:)

Q. Then when the engine would be there you would not need the gate? How do you know there are engines there every five minutes?

A. I was down there about one year ago for four or five days and saw the operation.

Q. Was the pit finished then?

A. No, sir. Not this pit, but I got a list of the engines that went over which was about four thousand in a month.

Q. Same at night?

A. There would be a great many.

Q. The engines that you speak about are they the engines that start out from the ready track?

207 A. No, sir. They are the ones going in.

Q. When they go in they go out?

A. Sure. They come in and go on the turn table and go out. The same engine.

JOHN NIXON, a witness of lawful age, produced in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

(By Col. Pearre:)

Q. What is your name?

A. John A. Nixon.

Q. Where do you live?

A. Brunswick, Frederick County, Maryland.

Q. By what railroad company are you employed?

A. By the Baltimore and Ohio.

Q. What is your business?

A. Locomotive engineer.

Q. How long have you been employed by the Baltimore and Ohio Railroad Company as a locomotive engineer?

A. I am now in my twenty-seventh year.

Q. Are you freight or passenger engineer?

A. Passenger.

Q. How long have you been a passenger engineer?

A. Twelve or fourteen years.

Q. How long before that were you a freight engineer?

A. I went to running a freight two or three years before that.

Q. What were you before that?

A. Fireman.

Q. What before that?

A. Brakeman.

208 Q. What before that?

A. I was in the shops at Piedmont as a water boy.

Q. You were water boy, then brakeman, fireman and engineer?

A. Yes, sir.

Q. You were brakeman how long?

A. Three years.

Q. Where was your run?

A. Brunswick to Cumberland.

Q. Are you familiar with the South Cumberland Yard?

A. Yes, sir.

Q. In your experience as a railroad man have you come into contact with cinder pits?
A. Yes, sir.
Q. Do you know the cinder pit in the South Cumberland Yard?
A. Yes, sir.
Q. How long have you known it?
A. Since the first part of January, 1913.
Q. Is that the first time it was put in operation?
A. Yes, sir. The first time I knew of it.
Q. Will you please state from your experience as a railroad man and a railroad engineer in reference to that equipment of the Baltimore and Ohio Railroad at that point, if that is a safe pit?
A. It is a safe pit; yes sir.
Q. Will you state whether the method of operation is safe?
A. Yes, sir.
Q. Will you please state whether its location with reference to the other parts of the equipment is a good one?
A. As good as they could be.
209 Q. When did you see it last?
A. I went in there on the 17th of last month and the 18th.
Q. Of February?
A. Yes, sir.
Q. You run in and out of that yard?
A. Yes, sir.
Q. Have you ever noticed the equipment for lighting there?
A. Yes, sir.
Q. How is the cinder pit lighted?
A. It is lighted good now.
Q. Do you know, Mr. Nixon, how it was lighted during last summer? Whether the same kind of lighting scheme it has now was used?
A. I generally got off of the engine before I got there.
Q. I understood you to say that you had been there at night?
A. Yes, sir.
Q. Well about the lighting?
A. As far as I know it is lit up al- right.
Q. Will you please state whether or not in your opinion a guard rail or barrier placed near enough to that cinder pit to prevent people from walking into it from the side would be a protection or a menace to the men around there?
A. It would be a menace.
Q. Why?
A. Because they could not clean their ash pans. It would be so far away that it would not prevent any one from falling into there.
Q. I am speaking now, Mr. Nixon, of the placing of guard rails near enough to protect people from walking in from the side would they be a menace?
A. Yes, sir. It would be to me.
210 Q. Why should it be a menace to you?
A. I could not inspect the engine properly.

Q. Do you inspect the engine?
A. Yes, sir. They give me ten minutes to inspect the bear
etc.
Q. Where do you get at that?
A. All around the engine.
Q. You say this would be a menace to you if you had a g
rail near enough to prevent men from going there?
A. Yes, sir.

Cross-examination.

(By Mr. Doub:)

Q. You spoke of being a water boy, what is that?
A. I carried water to the track men.
Q. You have seen pits of similar construction to this one?
A. Yes, sir; at Washington.
Q. Does that one at Washington have guard rails?
A. Yes, sir; but they took some of them down.
Q. Then it is guarded by guard rails now?
A. Yes, sir.
Q. What are the guard rails for?
A. I do not know what they were put there for but to keep pe
out of the pit, I suppose.
Q. You spoke of inspecting the engine?
A. Yes, sir.
Q. Is that done over the cinder pit?
A. No, sir; over the inspection pit.
Q. That is a separate pit?
A. Yes, sir.
211 Q. How long are these rakes?
A. Well, a man ought to have five or six feet play.
Q. How long are the rakes?
A. Ten feet, I suppose.
Q. What is this thing lying here on the ground in front of
cinder pit? (Indicating.)
A. That is a hook.
Q. Is that thing a rake?
A. No, sir; that is a hook. The rake is a hoe. That is a hook
Q. What is that used for?
A. If the cinders stick they can get up in there and clean it
Q. They have long rakes and short rakes?
A. Yes, sir.
Q. Then if I understand you, if the rails were put as near
tracks as the uprights are the guard rails would be a menace?
A. Yes, sir.
Q. But if they are put far enough away so as not to interfere w
the rakes they would not be a menace.
A. They would have to put them so far away that I cannot
that they would be a protection to that pit.
Q. It would protect the sides?
A. It would be too far away.

Q. Why?
A. If it was over three or four feet from the side it would not keep any one from falling in.
Q. Why?
A. Well, the person would go over there.
212 Q. If you would go against the railing you would know that something would be there?
A. That something ought to be there.

Redirect examination.

(By Col. Pearre:)

Q. You said something about the guard rails on the Washington pit being taken down.
A. Yes sir.
Q. Why did they take them down?
A. So that they could get use of the room that it takes to inspect an engine.
Q. In your opinion were they a protection or a menace there?
A. A menace. When we would get down we would have to keep our feet from going on them and they would give you more trouble than they were a protection.

Recross-examination.

(By Mr. Doub:)

Q. When did you last see that cinder pit?
A. I came out of there on the 18th.
Q. Of what?
A. Last month.
Q. February?
A. Yes, sir.

A. H. Hodges, a witness of lawful age, produced in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

(By Mr. Keedy:)

Q. Where do you live?
A. Cumberland, Maryland.
Q. What is your business?
213 A. General Foreman of the Baltimore and Ohio Railroad.
Q. How long have you been in the employ of the Baltimore and Ohio?
A. The last time only three months.
Q. Where were you employed before that?
A. With the Chesapeake and Ohio, the Norfolk and Southern and the Western Maryland Railway.
Q. How long have you been in the railroad business?
A. Twenty-four years.

Q. In what positions?
A. Mechanist, foreman, general foreman and master mechan
Q. You are general foreman of the Baltimore and Ohio now Cumberland?
A. Not at Cumberland, at Hardman, east of Grafton, on the w end of the Cumberland Division.
Q. Are you familiar with the south yard at Cumberland?
A. Yes, sir.
Q. Familiar with the cinder pit?
A. Yes, sir.
Q. What kind of a cinder pit is it?
A. Water pit.
Q. In your employment by railroads have you ever seen or co into contact with other cinder pits?
A. Yes, sir.
Q. State whether or not they were similar to this one?
A. Yes, sir; the one at Maryland Junction on the Western Ma land in West Virginia.
Q. Any other similar pits?
A. No wet pits.
Q. Dry pits?
214 A. Yes, sir. The dry pits are practically all for the sa general purpose and they are of the same general design.
Q. Will you state whether or not you consider the pit at Sou Cumberland reasonably safe in construction and method of ope tion?
A. Yes, sir.
Q. Will you state whether or not a guard rail or barrier arou on the sides of the pit would be a protection or a menace to t people working there?
A. A menace.
Q. Why?
A. Because a man getting down from the engine it would liable to *know* him under the engine. It would be in the way cleaning out ash pans, etc., and I would not consider it necessar
Q. In reference to the relative location of the pit to the rou house and coal tipple and the other buildings and equipment in t yard, state whether or not you consider the position of the cind pit reasonably safe and proper?
A. Yes, sir.
Q. Did you ever notice the equipment for lighting?
A. I spent thirty days around there at night.
Q. When?
A. From the 17th or 18th of December just thirty days.
Q. In what year?
A. In the year 1913.
Q. In what capacity?
A. I was checking out engines to see that they came out on tim I was in the vicinity of the ash pit for thirty days and may be t to two dozen times at night.
Q. How many times?

A. Ten to two dozen times.

Q. How well was the pit lighted?

215 A. Very well. So well that it was not necessary for me to carry a light.

Q. State whether you walked around the ash pit at night?

A. Yes, sir.

Q. Did you ever have any difficulty?

A. No, sir. I never cracked my shins.

Q. What kind of weather was it?

A. Well, whatever weather it was at that time—snowing, blowing, etc.

Q. Did that continue every day?

A. Yes, sir; every night from 6:30 at night to 6:30 in the morning.

Q. Your duty was to see that the engines get out properly?

A. Yes, sir. Checking them up.

Q. Will you state approximately how many engines come out to go in over those cinder pits from six o'clock in the evening until six o'clock in the morning?

A. Possibly one hundred and fifty.

Q. Average that every night?

A. No, sir; in twenty-four hours—from one hundred and forty to one hundred and fifty.

Q. Will you state whether more go out in day time or more at night?

A. Practically the same.

Q. Do you know what the operation is at the cinder pit when the engine comes on it? What is done?

A. I certainly ought to.

Q. What is that?

A. It is according to what the engine wants done. If it is necessary to clean the fire the drop brakes are dropped, the ash pan is opened and the dirt that has accumulated during the trip is shoved out of the fire box.

216 Q. What do you mean by the dirt?

A. Hot ashes, cinders, etc., and on account of the construction of some of the engines it is necessary for the men to get down along the side of the engine and shove the cake of cinders out of the ash pan and this falls into the water.

Q. After that is done what becomes of the engine?

A. The ash pan slides are shoved up and the hostlers take it to the ready track or round house.

Q. Will you state approximately the average time of an engine from the time it is taken on the ash pit until it goes on?

A. That depends upon the condition of the fire and the engine. Ordinarily in thirty or thirty-five minutes.

Q. You said approximately one hundred and forty or one hundred and fifty in twenty-four hours?

A. I think so, approximately.

Q. How many engines can be on the tracks of the ash pit at the same time?

A. Six, I judge. Three on each pit.
Q. In how quick succession can they follow each other?
A. Just as fast as you can keep them working.
Q. State whether or not the fire tracks are vacant—no engi
them at all at any time during the day?
A. I do not recall of ever seeing them vacant.
Q. Do not?
A. I do not recall of ever seeing them vacant. I never s
fire track vacant.

Cross-examination.

(By Mr. Wagaman:)

Q. About one hundred and fifty engines are handled in a
over this ash pit every twenty-four hours?
A. I would judge so; yes, sir; I said approximately.
Q. The engine crew ordinarily consists of about how
men?
217 A. Two.
Q. In addition to these two, other men are called
the engine at that point?
A. The engine crew are the fireman and engineer.
Q. I say in addition to these two another at least is called
the engine at that point.
A. The front brakeman is supposed to report at the ready
for his engine.
Q. There are other men working around that pit besides th
neer, fireman and brakeman?
A. Yes, sir.
Q. So that during the twenty-four hours quite a good man
are called into the vicinity of this ash pit day and night?
A. Yes, sir; men are working around there.
Q. Constantly men are moving around there?
A. Yes, sir.
Q. How many engines go out from the ready track every t
four hours?
A. That is according to the run. I did not check that.
Q. One hundred and fifty engines come in—that means on
dred and fifty go out?
A. No, sir. Some days they have a dispatchment of one h
and forty and some days twenty.
Q. Well, they come back?
A. No, sir; not always. Some may go to Keyser.
Q. You were there thirty days?
A. Yes, sir.
Q. State how many engines came out from these ready tr
the ash pit?
A. I would say twenty.
Q. An average of twenty each night from the east in?
A. Yes, sir.
218 Q. Now, how about the other way?
A. Well, some twenty or twenty-five passenger engi

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some engines on the Connellsville Division. I would say fifty-five or fifty-seven each night.

Q. Each engine started out is expected to carry three men?

A. No, sir.

Q. Did you not say, engineer, fireman and brakeman?

A. On the east end of the Cumberland Division the brakeman takes the engine at the ready track, but on the ready track on the west end of the Cumberland Division the crew takes their own engine to the Connellsville Division—the brakeman does not report for work there.

Q. You were down there the thirty days for the special purpose of checking up the engines?

A. Yes, sir.

Q. To see that they went out on time?

A. Yes, sir.

Q. You were there all kinds of weather?

A. Yes, sir.

Q. You had a box in which to stay?

A. No, sir. I was out in my clothes in the weather. I did not go down there to get into a box.

Redirect examination.

(By Mr. Keedy:)

Q. Mr. Hodges, you say twenty engines went out each day?

A. Yes, sir; approximately.

Q. Did you mean twenty engines each twenty-four hours or each night?

A. No, sir; not each night.

Q. Fifty-five or seventy went out from the west end?

A. All told.

219 Q. Those that went out from the west end, where do the engineer and fireman get their engines?

A. Just below the lane.

Q. Mr. Hodges, will you state how many men are employed at the cinder pit on the turn at night?

A. There are supposed to be three gangs called fire knockers—that is six men—two men running engines upon the pit and two men running them to the round house—two engine inspectors in the vicinity or below the pit—one foreman of the hostlers and in addition to that the coal tipple man that operates the coal tipple. He is on that incline.

Q. Are these men all termed hostlers?

A. No, sir. There are six fire knockers, I think. The foreman of the hostlers can tell you exactly. That is approximately. In addition to that also the tool or supply boy has occasion to be around there at night. I would judge about twelve men working around there.

D CLOSE IN CENTER

Recross-examination.

(By Mr. Wagaman:)

Q. What does a hostler do?
A. He handles the engine.
Q. Where does he take them?
A. Wherever they should go. To the round house or the ready track.
Q. He puts the engines on the ready track?
A. Yes, sir; and takes care of them until the engineer takes them away.

THOMAS R. STEWART, a witness of lawful age, produced in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

(By Col. Pearre:)

Q. What is your full name?
A. Thomas R. Stewart.
220 Q. Where do you live?
A. Cumberland.
Q. Mr. Stewart, you said before that you were master mechanic at Cumberland?
A. Yes, sir.
Q. You have charge of the yard around there?
A. Yes, sir.
Q. Are you familiar with cinder pits and their use?
A. Yes, sir.
Q. And the purpose for which they are constructed?
A. Yes, sir.
Q. Do you know the cinder pit of the Baltimore and Ohio Railroad at Cumberland?
A. Yes, sir; it is under my control.
Q. How long have you had that cinder pit under your control?
A. Since April 15th, when I came to Cumberland.
Q. Is the lighting equipment the same now as it was when you first came there?
A. Yes, sir.
Q. Mr. Stewart, will you please tell the jury from your experience as a railroad man and an engineer whether the scheme of the yard with reference to the location of the cinder pit, the round house and the coal tipple, etc., there is a proper and safe location?
A. Yes, sir; it is.
Q. Is the cinder pit a safe equipment and device?
A. Yes, sir; it is.
Q. Do you know the method of operation of the cinder pit?
A. Yes, sir.
Q. Is it a modern method of operation?
221 A. It is.
Q. Please state to the jury whether the design and construction of the cinder pit is modern?

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A. Yes, sir; it is modern.
Q. It is a water pit, I believe?
A. Yes, sir.
Q. Mr. Stewart, you have lived in Cumberland and been about South Cumberland a great deal, have you not?
A. Yes, sir.
Q. Do you know the distance from Springdale street to Virginia avenue?
A. Yes, sir.
Q. It is one block, is it not?
A. Yes, sir; one block.
Q. Do you know the distance from Virginia Ave. to the gate of the Baltimore and Ohio Railroad Yards on Virginia Ave.?
A. From Virginia Ave. down to the gate of the yard is about five hundred and forty feet.
Q. What is the distance from the gate to the door of the caller's office, if you know?

(By the Court:)

Q. What is the object of this?

(By Col. Pearre:)

A. To show the route.

(Question was not answered and next one was asked.)

Q. What is the distance from the caller's office to the cinder pit? Do you know?
A. Why, I am not sure, but I think it is about three hundred feet.

(By Mr. Doub:)

Q. Have you measured it, Mr. Stewart?
A. Yes, sir.
Q. Would you pass anything along the Baltimore and Ohio Railroad tracks from Virginia Ave. down the track to the caller's office—if you would go past Virginia Ave., on the railroad and go right down through the yard into the caller's office?
222 A. Yes, sir. The track that goes into the old round house, several switches, a water tub, then you go a short distance and come to two more water tubs and cross two tracks that go into the old round house, then you go round the material platform and then to the caller's office door on the north side.
Q. What is the nature of the tubs that you speak about and where are they situated?
A. Well, they are between Virginia Ave. and the caller's office going in that direction, and the tubs stand there two of them side by side holding one hundred thousand gallons of water and the one standing by itself holding fifty or one hundred thousand gallons of water.

(By the Court:)

Q. What is the object of this?

LOSE IN CENTER

(By Col. Pearre:)

A. We are showing the obstructions that this man passed whil going down the track that night.

Q. Then you would come to the caller's office?

A. Yes, sir.

Q. Do you remember the old "Y" track that was there?

A. I did some years ago.

Q. Do you know when that was taken out?

A. I do not know the exact time, but it was taken up to let thi new work go on.

Q. Was it there when you came there in April?

A. No, sir.

Q. Was it in June of 1913?

A. No, sir.

Q. Any part of it?

A. No, sir.

Q. Mr. Stewart, can you tell the jury what the clearance is between the engine and the struts there between the uprights?

A. Yes, sir.

Q. What is it?

223 A. There are twenty-four inches between the cylinder and the structural work and twenty-six inches between the tank.

Q. What kind of engines?

A. On the large engines we have less space.

Q. What is the distance between the tracks and the foundation of the uprights?

A. The height of them?

Q. No—between the track and the foundation of the uprights?

A. That is five feet or five feet four inches.

Q. What is the nature of this iron construction there with reference to these struts or horizontal beams that join the uprights? How often do they occur?

A. They are twelve or fourteen feet. Every third one is an opening.

Q. What is in that?

A. Nothing.

Q. What are they used for?

A. We place the fire box between these openings to handle the ash pans.

Q. Do you know the number of engines that go in and come off of this cinder pit every day?

A. Yes, sir.

Q. How many?

A. One hundred and forty-five to one hundred and fifty engines every twenty-four hours.

Q. How was it last June?

A. About the same.

Q. It varies?

A. Yes, sir.

Q. Will you please state to the jury if you know from the number

of engines operated there over the cinder pits, what would be
224 the greatest length of time that any portion of the track along the cinder pits would be unoccupied by an engine moving to and fro?

A. There is very little time that engines are not moving up and down on the fire track.

Q. What would be the greatest length of time?

A. Five or six engines one direction or the other all the time.

Q. On every track?

A. Yes, sir.

Q. Same at night as day?

A. Yes, sir. They handle about the same number of engines at night as day. The difference is very little.

Q. Do you know the nature of the lighting equipment there at the cinder pit?

A. Yes, sir; they have four arc lights there.

Q. State if you can definitely where these arc lights are located?

(Objection; objection withdrawn.)

Q. Do you know the capacity of these lights?

A. One thousand candle power each.

Q. Four of them?

A. Yes, sir.

Q. Are there not other lights there?

A. Yes, sir; four small lights on the crane.

Q. What is the candle power of those?

A. Two hundred candle power each.

Q. Where is the traveling crane at night?

A. On the east end.

Q. What would be the effect of these four lights amounting to two hundred candle power each over the east end of the cinder pit at night?

225 A. It would give it good light.

Q. When do they burn?

A. At night.

Q. All night?

A. Yes, sir.

Q. Regardless of whether or not the crane is operating?

A. Yes, sir; we do not operate it at night.

Q. But you keep these lights burning all night?

A. Yes, sir.

Q. Will you please state, Mr. Stewart, of whom the engine crew consists and of whom the train crew consists?

A. The engine crew consists of the engineer and fireman and the train crew consists of the brakeman, conductor and flagman.

Q. That is the front or rear brakeman?

A. Front and rear brakeman and flagman. There should be two brakemen there.

Q. One of them is called flagman or head brakeman?

A. Yes, sir.

(By Mr. Doub:)

Q. The rear brakeman is flagman, is he not?

A. On some of these long trains they have two brakemen and a flagman.

L. J. WILMOTH, a witness of lawful age, produced in behalf of the defendant, being duly sworn, testified as follows:

(By Col. Pearre:)

Q. What is your full name?

A. Leonard J. Wilmoth.

Q. You live in Cumberland?

A. Yes, sir.

Q. How long have you lived in Cumberland?

A. Since 1899.

226 Q. What is your business?

A. Road foreman of engines.

Q. What railroad?

A. Baltimore and Ohio Railroad.

Q. What were you before you became road foreman of engines?

A. I was assistant road foreman of engines.

Q. Before that what?

A. Traveling engineer.

Q. Before that what?

A. Locomotive engineer.

Q. Before that what?

A. Fireman.

Q. First became fireman and rose up as you have indicated?

A. Yes, sir.

Q. Has your business as a railroad man brought you into contact with cinder pits?

A. Yes, sir.

Q. Do you know the cinder pit in the Baltimore and Ohio Railroad Yard at South Cumberland?

A. Yes, sir.

Q. Do you know whether or not considering your experience as a railroad man and engineer that cinder pit of the Baltimore and Ohio Railroad at Cumberland is of modern design?

A. Yes, sir.

Q. It is of modern construction and operation?

A. Yes, sir.

Q. Is it properly located with reference to the other equipment around there?

A. Yes, sir.

227 Q. Is it a safe cinder pit?

A. According to my judgment it is.

Q. It is a water pit, is it not?

A. Yes, sir.

Q. Look at this list which was shown to you yesterday I believe, and state if you will for what that list is used and designed?

A. The purpose of that list is to be used to check up supplies

that are on a locomotive transferred from one territory to another to show absolutely what is on the engine when it is transferred.

Q. Check it up in whose hands?

A. The inspector that is at the terminal when the engine goes out or the supply inspector.

Q. Whom do they check up?

A. They will check up say, for instance an engine is being transferred from one territory in which it has been working over to another to which it is going to work—they will check up to show whether or not there is sufficient tools on the engine when it goes to that territory. If not, to show they are not responsible for the shortage to the division from which it comes as that division is responsible and be charged up for it.

Q. Who is responsible?

A. The division from which it came.

Q. It is just simply to check up and keep track of the supplies.

A. Yes, sir. Just simply to check up and keep track of the supplies.

Q. Mr. Wilmoth, do you know the equipment for lighting at the cinder pit?

A. Yes, sir.

Q. Were you about there at night at all?

A. I do not suppose that there is a man around there that passes it any more times at different times than I do.

228 Q. At night?

A. Yes, sir.

Q. Will you please state whether the equipment for lighting down there is an adequate one for the cinder pit?

A. There has been sufficient light at that cinder pit at all times that I have been there to give perfect light to walk around that pit at any time.

Q. Have you been there all kinds of weather?

A. Yes, sir.

Q. When foggy?

A. Yes, sir.

Q. Did you have any trouble to get around there without a lantern?

A. No, sir.

Q. Where did you get your light from?

A. From the cinder pit.

Q. From the lights and stand there?

A. Yes, sir.

Q. Do you know whether those lights were there on June 23rd, 1913?

A. I do not know.

A. I mean the apparatus?

A. Yes, sir. The apparatus has been there ever since it was in operation.

Q. Do you know whether or not they were equipped with globes and already for lighting?

A. I never saw them at any time that they were not fully equipped.

Q. Ready for lighting?
A. Yes, sir.
Q. You saw them before June 23rd, 1913?
229 A. Yes, sir.
Q. And after?
A. And after; yes, sir.
Q. From your experience as a railroad man, will you please state to the jury whether this cinder pit could be properly operated for the purposes for which it was designed if any guard rails or barriers were placed up there around it?
A. It could not.
Q. What would be the effect of placing guard rails up there close enough to protect people going up there from the side from falling in? Would they be a protection or a menace?
A. A menace. The men could not operate their tools to properly clean the engines. Ordinarily the hostlers must use an iron bar about eight feet long to open the ash pan slide by putting it under and prving the ash pan open.
Q. They would have to raise the handle up?
A. Yes, sir. And that iron bar or poker is for the purpose of breaking up the cinders in the fire box and in case they would have to use that poker for raising the slides up they could not do it. They could not use their rakes for cleaning out the ash pans. After the fire box is cleaned the fire is also built up, which causes smoke and steam that somebody would be likely to get between the locomotive and railing and get run down and liable to be run over and killed.
Q. Has the front brakeman of a train crew anything to do with the cinder pit?
A. No, sir.
Q. He has no business around the cinder pit, has he?
A. No, sir.

Cross-examination.

(By Mr. Doub:)

Q. In the previous trial you did not testify that you knew anything about the lights?
A. I do not think that I was asked anything about the lights?
230 Q. And still you knew as much about the lights as you do now?

(Objection; objection sustained.)

Q. How near is the ready track to the cinder pit?
A. The ready track—I could not tell you.
Q. I mean the first track next to the cinder pit, how far is it from the cinder pit?
A. About twenty-five feet I would say—the ready track.
Q. The first track next to the cinder pit is how far from the cinder pit? That track there (Indicating)?
A. I could not tell you in feet, but I would suppose about 12 or 15 feet.

Q. Are you sure of that?
A. No, I am not positive of the number of feet.
Q. How far is the second track from the first track?
A. Fifteen or eighteen feet further south.
Q. You say these tracks are fifteen or eighteen feet apart?
A. No, sir.
Q. How far apart?
A. Between the rails five or six feet and may be seven.
Q. The head brakeman is required to be down there at the ready track?
A. He is required to be there when the time comes for the engine to move.
Q. That is about the cinder pit?
A. Yes, sir.

M. C. ALBRIGHT, a witness of lawful age, produced in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

(By Col. Pearre:)

Q. Where do you live?
231 A. South Cumberland, Maryland.
Q. How long have you lived in Cumberland?
A. I lived there from 1899 until the year 1908. Then I moved to Martinsburg and moved back this summer.
Q. Where were you living on June 23rd, 1913?
A. At Martinsburg at that time.
Q. Where were you boarding in Cumberland?
A. Keys Hotel.
Q. Where is that?
A. (Lang) Avenue.
Q. How far from Virginia Ave.?
A. One block.
Q. What is your business?
A. Engineer.
Q. How long have you been an engineer on the Baltimore and Ohio Railroad?
A. Ten years.
Q. What were you before that?
A. Fireman.
Q. How long?
A. About three and one-half years.
Q. What before that?
A. A farmer. I was raised on the farm.
Q. Mr. Albright, will you please state what you did on the morning of the 23rd of June, 1913, in connection with your railroad service?
A. After I was called, you mean for duty?
Q. Yes, sir. When were you called for duty?
A. About 12:30 at night.

Q. When were you ordered to report?
232 A. At 1:45.
Q. You were at the Keys Hotel?
A. Yes, sir.
Q. Which way did you go to your engine?
A. Well, I came from this hotel down this block to Virginia Ave., and then southward to Virginia Ave., railroad crossing on Virginia Ave., and then turned in at that opening there and went east to the old round house.
Q. Do you mean a gate?
A. It is not a gate, but it is an opening where the engine cross the street track. This whole territory is fenced in by the Baltimore and Ohio and the gates come up about to the main line through there.
Q. What street did you walk down?
A. Virginia Avenue.
Q. Did you have a lantern?
A. No, sir.
Q. What kind of a night was it?
A. It was not exactly clear.
Q. How was it?
A. It had been raining, but was not at that time. It had quit raining. It was a kind of hazy night.
Q. You had no lantern?
A. No, sir.
Q. Did you have any difficulty in getting down to the caller's office without a lantern?
A. No, sir.
Q. You went to the caller's office?
A. Yes, sir.
Q. What did you do?
A. Reported for duty.
233 Q. Then what?
A. Went to my engine.
Q. Which door did you go out of the caller's office?
A. The south door.
Q. Where was your engine?
A. Down on the ready track.
Q. In going down to your engine on the ready track what did you have to pass?
A. Several tracks there that come out from the ash pit. I crossed them.
Q. Did you have to pass the end of the cinder pit to get down there?
A. Well, it comes up pretty close.
Q. You did not have a lantern?
A. No, sir.
Q. Did you have any trouble?
A. No, sir.
Q. On which ready track was your engine standing?
A. On the north one. The first one.

Q. How many ready tracks are there?
A. Two.
Q. I see it appears about three tracks here. State what those tracks are (Witness is shown picture). How many tracks are there south of the cinder pit?
A. Three.
Q. What is the first one?
A. The first one is a dry ash track and the other two are ready tracks.
Q. Where does the dry ash track run with reference to the coal tipple—which side of the coal tipple does it run on?
A. It runs along the end of the coal tipple.
234 Q. And the two ready tracks are south of that?
A. Yes, sir.
Q. On which track was your engine standing?
A. On the ready track.
Q. Not on the dry pit track?
A. No, sir.
Q. What time did you arrive at your engine?
A. About 1:45.
Q. When were you due to leave with your engine?
A. At 2:05.
Q. Why were you there that much ahead of 2:05?
A. To get my engine ready.
Q. What did you have to do?
A. To inspect my engine, oil it up and see that it was ready to make the trip.
Q. In doing that what did you do that night?
A. When I first came to the engine I got up into the cab of the engine.
Q. Was anybody there?
A. No, sir.
Q. Were you the first man there?
A. Yes, sir.
Q. Then what did you do?.
A. I took my keys and unlocked my box and put on my clothes and looking around I saw that the necessary supplies had been brought me and then I got down and inspected my engine to get ready for the trip.
Q. In all that time you were doing these things, where were you with reference to the engine?
A. I was close to it. I would not have been over two or three feet away.
235 Q. Who was in charge of your engine?
A. I was.
Q. Did you leave your engine in charge of Fireman Dyche?
A. I did not. I did not turn my engine over to any one during this trip. I had charge of it myself all the time.
Q. You are sure of that?
A. Yes, sir.

Q. While you were there on the ready track did you give the en
gine in charge of anybody?
A. No, sir.
Q. Will you please state whether or not, Mr. Albright, the light
were burning about the cinder pit that night?
A. Yes, sir.
Q. Do you know how many?
A. No, sir. I do not know how many, but the place was wel
lighted up. I do not know where they stand at, but they light th
cinder pit and the ash track up and the whole country aroun
there that we are supposed to go around.
Q. When did you first see Mr. Whitacre that night?
A. Why I did not see him close enough to say anything to hi
until we got down—— (Witness interrupted.)
Q. State when you first saw Mr. Whitacre?
A. When I blew the signal that I was ready to go, then he steppe
upon the pilot of the engine and acknowledged me with a whit
lantern that he was ready to go ahead.
Q. You knew that it was Mr. Whitacre?
A. Yes, sir.
Q. When did you see him after that?
A. At Evitts Creek.
Q. What was done at Evitts Creek? and by whom?
A. When we got down there there is a cross over switch—tw
switches were at each end—and he has them to handle.
236 Q. Did he handle them?
A. Yes, sir. He got off of the engine and waited unti
the tank came back and then he stepped up.
Q. You let him off of the engine?
A. Yes, sir.
Q. Did you stop the engine?
A. Yes, sir.
Q. How did he get on?
A. On the tank.
Q. What did he do next?
A. He pulled the switch over and after we got through he pu
it back.
Q. How is that switch moved?
A. It is turned in a hook and fixed so that if we run through
them we break them. He unlatches it and lays it over.
Q. Is it on the ground?
A. Yes, sir.
Q. Do you have to stoop down?
A. Yes, sir.
Q. That is the way these switches have to be handled?
A. Yes, sir.
Q. After he fixed these switches what did he do? Did he ge
back on the engine?
A. No, sir. He waited a little there, as we did not know just
where to get a train. In two or three minutes the conductor came
down.

Q. What did he do that night in making up that train?
A. He put me in against the cars there as we backed up.
Q. Did he couple them?
A. I would not be positive which of the crew done it. They were all working.
237-245 Q. Which of the crew were around there?
A. They were all there.
Q. Whose duty was it?
A. Front brakeman.
Q. It was Whitacre's duty?
A. Yes, sir.
Q. You did not see him do it?
A. No, sir. Not positive.
Q. Then what did you do?
A. We picked up these cars and were ready to go ahead.
Q. Where did he go?
A. Up on the train.
Q. When did you see him next?
A. When we were ready to pull out.
Q. Where was he then?
A. He was back on the head of the train then and came in over the head of the train to the engine.
Q. What do you mean? Did he climb over the tank and come over to the engine?
A. Yes, sir.
Q. How do you climb over them? On a ladder?
A. You come up here and there is a space and then climb up on that side of the car and over it and so on.
Q. Where did he sit when he got on the engine?
A. On the right side of the engine.
Q. Where was the engine then?
A. At Evitts Creek.
Q. Then you went on — the next point? Where did you stop next?
A. I do not just remember.
246 Q. You stated on direct examination that it had been raining?
A. It had been raining. It was foggy.
Q. This yard is in a low place?
A. Yes, sir.
Q. If there is any fog around it will be in that place?
A. Yes, sir.
Q. It is surrounded by the river and mountains and hills?
A. Yes, sir.
Q. Where did this engine stand with reference to the coal tipple?
A. The front of the engine—that is the pilot—as near as I can remember stood about ten or twelve feet west of the coal tipple on the first ready track.
Q. You know who had put that engine there?
A. No, sir.
Q. Do you know whose duty it was to put that engine there?

A. They have a man appointed for that purpose. I do not know just what they call him. They have a man that takes the engines from the turntable and from the round house and puts the engines on this ready track for the engineers that are called out to take charge of them.

Q. Were you present at the time the report of this accident was made out on the trip at Hansrote by the conductor, Mr. Ambrose?

A. No, sir.

Q. Did you hear anything about that?

A. No, sir. Not until we got into this trial.

Q. Heard nothing about it on the trip?

A. No, sir.

Q. How soon did you get on the engine before it started from the ready track?

247 A. I do not just remember the minutes, but we left there on time, I remember.

Q. How long had you been on the engine preparatory to going before you did start?

A. Do you mean after I had my work done?

Q. I do not know anything about your work. Will you state to the jury how long you were on the cab of the engine before the engine started towards Evitts Creek?

(By the Court:)

Q. How long were you on the engine from the last time you got on until you started to Evitts Creek?

A. It would not have been over two minutes on the outside.

Q. You would remember that you were on the cab of the engine full two minutes at that time?

A. My work would have kept me on the ground until about the time I would have started.

Q. Are you testifying to what did happen or what generally happens?

A. What did happen.

Q. How about other nights?

A. About the same. I get on the engine about two, three or four minutes before the engine starts.

Q. Then this might have been three or four minutes?

A. I do not know. To the best of my recollection I got up on the engine about two minutes before it started.

Q. Do you not know, Mr. Albright, that Whitacre had gone for the tin cup and had been so told by Dyche and you were waiting for Whitacre to come back with the tin cup before you were ready to start?

A. No, sir. I did not know anything of the kind.

Q. Had you not been told by Mr. Dyche that Mr. Whitacre had gone for the tin cup?

A. No, sir. I had not.

Q. Did not Mr. Whitacre come back to the cab wet and climb up into the cab wet and have to light that lantern?

248 A. No, sir. I do not know anything about that.

(By Col. Pearre:)

Q. Did Mr. Whitacre borrow your watch at Evitts Creek?
A. No, sir.

JOHN A. H. DYCHE, a witness of lawful age, produced in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

(By Col. Pearre:)

Q. Where do you live?
A. Martinsburg, West Virginia.
Q. What is your business?
A. Fireman.
Q. What railroad?
A. Baltimore and Ohio.
Q. How long have you been a fireman on the Baltimore and Ohio Railroad?
A. Something over four years.
Q. What were you before you were fireman?
A. Brakeman.
Q. Were you a member of this crew of engine 4153?
A. Yes, sir.
Q. On the night of June 23rd, 1913?
A. Yes, sir.
Q. What time were you called Mr. Dyche?
A. 1:45.
Q. Where were you living then—that is, where were you staying that night?
A. Baltimore and Ohio Y. M. C. A. at Cumberland.
249 Q. Where is the B. & O. Y. M. C. A. with reference to the yards of the Baltimore and Ohio Railroad, with reference to the cinder pit?
A. Lays just west of the yards.
Q. How far away? Just across the street, is it not?
A. Yes, sir. Just across the street.
Q. What did you do? Which way did you come to the yards?
A. Right across Virginia Avenue to the shops and the caller's office.
Q. What kind of a night was it?
A. It was a dark and hazy night.
Q. Was it raining?
A. It had been.
Q. Was it raining then?
A. No, sir.
Q. Did you have a lantern?
A. No, sir.
Q. You walked to the caller's office?
A. Yes, sir.
Q. Into which door of the caller's office did you walk?
A. North side—on the north side of the building.

Q. How long were you in there?
A. Not very long; I just reported.
Q. Which way did you go out?
A. Out of the north door.
Q. Then where did you go?
A. Over to the ice car between the caller's office and the store room.
Q. Place where they keep ice?
A. Yes, sir.
250 Q. What did you go over there for?
A. A piece of ice for the engine.
Q. To put in the cooler?
A. Yes, sir.
Q. Did you get the ice?
A. Yes, sir.
Q. Then where did you go?
A. Down to the engine.
Q. In going from the north door of the caller's office to this ice car what did you cross?
A. One track and different other machinery that belongs to the engine.
Q. Where was that?
A. Laid between the store room and the caller's office.
Q. Where was that?
A. Stored up.
Q. You walked through that to get to the ice car?
A. Yes, sir.
Q. When you came back did you do the same thing?
A. Yes, sir.
Q. Had no lantern?
A. No, sir.
Q. How did you see?
A. From the arc lights.
Q. In the yard?
A. Yes, sir.
Q. Which way did you go to your engine?
A. Right back across the track to the caller's office and down the tracks to the engine.
251 Q. What would you have to cross in the way of tracks, etc., from the ice car to the engine?
A. Four tracks and the material that lay there.
Q. Where would you go with reference to the cinder pit?
A. Across at the west end of it.
Q. Past the west end of it?
A. Yes, sir.
Q. Then you went past the west end to the engine?
A. Yes, sir.
Q. Where was your engine?
A. Near the middle of the ash pit.
Q. On which side?
A. South side.

Q. How far up, if you can recall, was your engine west of the coal tipple—or was it west of the coal tipple?
A. Yes, sir; west.
Q. How far west, approximately?
A. At least one hundred and seventy-five feet.
Q. How do you locate it at that point, if you know?
A. Why, I went across from the engine there to the hose where I got the water for my cooler.
Q. Where is the hose?
A. Between the ash pit and the dry track—in between that iron structural work.
Q. At what portion of the south side of the cinder pit is it towards the end or center?
A. About middle ways—as near as I can tell you.
Q. Your engine was about there?
A. Yes, sir.
Q. Who was on your engine, if anybody, when you got there?
A. Mr. Albright was there.
252 Q. You remember that, do you?
A. Yes, sir.
Q. Where was he standing?
A. On the right side of the engine.
Q. What was he doing?
A. He was on the apron of the box getting his clothes out.
Q. What was he doing? What was his position?
A. Stooping over opening the tank box.
Q. Where were you standing?
A. About middle ways the fire board on the apron.
Q. Was Mr. Whitacre there then?
A. He came shortly afterwards.
Q. When he came there where was Mr. Albright and where were you and where Mr. Whitacre?
A. I was standing in between the two on the apron.
Q. Where were you?
A. On the apron.
Q. Where was Mr. Whitacre?
A. Standing on the apron also.
Q. He was on the engine?
A. Yes, sir.
Q. How far from you?
A. As far as between me and the stenographer.
Q. How far was Albright from you?
A. Not very far.
Q. How far would Mr. Albright then be from Mr. Whitacre?
A. About twice the distance between the two of us.
Q. Between whom?
253 A. Me and that man there.
Q. You and the stenographer?
A. Yes, sir.
Q. Can you state in feet or inches about what that distance would be?

A. About six or seven feet.
Q. Between whom?
A. Between Mr. Whitacre and Mr. Albright.
Q. And you were between them?
A. Yes, sir.
Q. What, if anything, did you say to Mr. Whitacre when he came?
A. He went to set his bucket up on the end of the tank and I told him to set it into the tank box.
Q. Why?
A. That is would get wet up there when we sprinkled the tank with the hose.
Q. What did you say to Mr. Whitacre?
A. Nothing that I remember after that.
Q. Did you ask or tell Mr. Whitacre to go and get a tin cup?
A. No, sir; there was something said about a tin cup, but I do not know what it was.
Q. Did you direct Mr. Whitacre to go and get a tin cup?
A. I have no authority to.

(By the Court:) This is not evidence of authority. It is just how he remembers what he did.

Q. Did you say anything to Mr. Whitacre about a tin cup?
A. No, sir. Not that I remember of.
Q. Then what did Mr. Whitacre do?
A. He got off of the engine after he put his bucket in
254 the box.
Q. Did he say anything to Mr. Albright or Mr. Albright to him?
A. No, sir.
Q. Was there any light in the cab of the engine on the engine?
A. No, sir.
Q. How did you see to move around there?
A. There was light there from the arc lights.
Q. Arc lights where?
A. Along the engine and along the ash pit.
Q. Did Mr. Albright have a light?
A. No, sir.
Q. Did you have a light?
A. No, sir.
Q. Was there a torch standing there on any part of the engine?
A. No, sir. We had not got our torches out of the box yet.
Q. What time was this when you all three met there at the engine together?
A. Five minutes of two.
Q. How long did Mr. Whitacre remain there before he left?
A. He was not there very long.
Q. Do you know whether he said anything when he left? If so, what?
A. I do not remember of him saying anything. Something about a tin cup was said after he put his bucket into the tank box.

Q. Did you say it or he?
A. He said it.
Q. Then what did he do?
A. Got off the engine.
Q. How long after that did you see him again?
255 A. It was not very long.
Q. Can you give any idea of how long?
A. Five or ten minutes.
Q. When he came back, where were you?
A. Standing on the fire board.
Q. Where was Mr. Albright?
A. On the right side of the engine.
Q. Did Whatacre say anything to you when he came back?
A. He told me the fell into the ash pit.
Q. Did he say how he fell into it?
A. He said he fell in going around the engine.
Q. Can you tell the substance of what he told you?
A. The way I understood him it must have been in the north side of the pit.

(By the Court:)

Q. State what he said and not what you understood.

Q. Mr. Dyche, can you remember the words that he used?
A. He told me that he fell into the ash pit?
Q. Well, but in reference to where he fell into the ash pit, do you remember the words?
A. He said something about going around the west end of the pit. I do not know just what.
Q. Just state the substance of what he said if you can and if you can not say so?
A. I can not just explain it. All that I can remember is that he said he fell into the ash pit and knocked some hide off of his shin.
Q. Did he tell you which end of the ash pit he came around?
A. He did not say, but I understood——
Q. What was his condition?
A. He was wet up to the waistband of his pants.
256-259 Q. Was he wet up under his arms?
A. No, sir.
Q. *When* did he do then?
A. He asked me if I was ready to go and I told him, "Yes, sir," I was ready to go.
Q. Then what did he do?
A. Went around the pilot of the engine and waived his lantern for us to go ahead.
Q. Was it his lantern?
A. His, I suppose.
Q. Was it yours?
A. No, sir.
Q. Was it Albright's?

A. No, sir.
Q. Will you please state when he left the engine whether or no he had a lantern?
A. Yes, sir; he had a lantern.
Q. When he came back did he have one?
A. Yes, sir.
Q. Was it lit?
A. Yes, sir, it was lit.
Q. Do you know where he lit it?
A. No, sir.
Q. Did he light it at the engine?
A. No, sir. Not that I saw.
Q. He got on the pilot of the engine and started out?
A. Yes, sir.
260 Q. In reference to drinking water, how often would you drink and how much?
A. Ten or twelve drinks, something like that.
Q. Did you have water in the cooler that night?
A. Yes, sir.
Q. Ice?
A. Yes, sir.
Q. Who put it there?
261 A. I did before we left Cumberland.
Q. As you described with this hose?
A. Yes, sir.
Q. Please look at that cooler and state whether you had a similar cooler on your engine that night?
A. Yes, sir; we had a cooler just exactly like that.
Q. Did you have a tin cup that night?
A. No, sir.
Q. How did you get your water?
A. Out of this lid.
Q. Do you know when you had a tin cup on that engine last?
A. There had not been any on it that I know of.
Q. Had Mr. Whitacre been on it before?
A. Yes, sir.
Q. Without a tin cup?
A. Yes, sir.
Q. Just show the jury how you got your water that night?
A. We would take this lid and turn it over and drink out of that?
Q. Did you have plenty of water?
A. Yes, sir.
Q. Did you have to renew the water that night?
A. No, sir. Not that I remember of.
Q. Are you familiar with the yards of the Baltimore and Ohio Railroad at South Cumberland in and around the cinder pit there?
A. Yes, sir.
Q. Will you please tell to the jury whether the yards at that point are badly or well lighted?

A. Well lighted.
262 Q. How were they lighted that night?
A. Good for the kind of a night it was.
Q. You remember that al- right?
A. Yes, sir.
Q. Were all the lights burning?
A. Yes, sir.
Q. The lights around the cinder pit?
A. Yes, sir.
Q. Did Mr. Albright leave the engine that night on the ready track while you were there?
A. No, sir. He was around the engine there oiling and looking after his work.
Q. Did Mr. Albright on the night of June 23, 1913, leave the engine in your charge at any time?
A. No, sir.

Cross-examination.

(By Mr. Doub:)

Q. Mr. Dyche, what time did Mr. Albright get to the engine?
A. I cannot tell you that he was there ahead of me.
Q. What time did you get to the engine?
A. About 1:45 when I arrived there.
Q. What time did Mr. Whitacre get to the engine?
A. About five minutes of two when he arrived here—something like that.
Q. Did he then get on the engine?
A. Yes, sir.
Q. And then you told him to put his bucket in the tank box?
A. Yes, sir.
Q. Which tank box?
A. The left tank box. That would be on the side of the engine that he rode on.
263 Q. Why did you tell him to do that?
A. To keep from getting his bucket wet.
Q. Had he put it on the coal?
A. Yes, sir.
Q. On the coal?
A. No, sir; out on the tank.
Q. Did he put it in the tank box?
A. Yes, sir.
Q. Then he went to the left side of the engine?
A. Yes, sir.
Q. Who was in the right side?
A. Mr. Albright.
Q. It was a well lighted night?
A. Yes, sir.
Q. Mr. Whitacre could have seen Mr. Albright?
A. Yes, sir; if he would have looked.
Q. This was five minutes of two?

A. Yes, sir; about.
Q. What did Mr. Whitacre do then?
A. When he put his bucket into the tank box something wa
said about a tin cup.
Q. Who said it?
A. Mr. Whitacre.
Q. What did he say?
A. Nothing particular.
Q. Did he ask whether there was a tin cup there?
A. Not that I remember of.
Q. Was there a tin cup there?
A. No, sir.
264 Q. When he said something to you about a tin cup wha
did you reply to him?
A. I do not remember.
Q. If you had replied would you remember it?
A. I may and I may not.
Q. Then what did Whitacre do?
A. Got off of the engine.
Q. Did he have his lantern with him?
A. Yes, sir.
Q. Then when is the next you saw Whitacre?
A. When we were about ready to go.
Q. What was Whitacre doing when you next saw him?
A. When he came back he was wet and told me he had falle
into the ash pit.
Q. How long had he been gone?
A. Five or ten minutes.
Q. Where was Whitacre when he told you that he had falle
into the ash pit?
A. He did not exactly state where he was at.
Q. Where was he standing when he told you that?
A. Standing on the step of the engine.
Q. How far from you?
A. Four or five feet.
Q. And the engineer was in his cab?
A. Yes, sir.
Q. Ready to start?
A. Yes, sir.
Q. Did he whisper to you?
A. No, sir.
Q. Spoke loud enough to hear?
265 A. Yes, sir.
Q. Where were you?
A. On the platform of the engine.
Q. Was the door open?
A. Yes, sir.
Q. Did you open it?
A. Yes, sir; to put coal in.
Q. Did you do it more than once before the engine started?
A. Yes, sir.

Q. What else did he tell you except that he had fallen into the ash pit about the injury?
A. He told me that he had knocked some hide off of his shin.
Q. What else about the injury?
A. That is all I remember.
Q. That he had fallen into the ash pit and knocked some hide off of his shin?
A. Yes, sir.
Q. Is that the only time that he told you he had fallen into the ash pit?
A. Yes, sir. That I remember of.
Q. Is that the only time he told you on the trip that he had fallen?
A. Yes, sir; that I remember.
Q. Did you not hear him say at Cumbo Yard in the presence of Mr. Albright and Mr. Ambrose that he had fallen into the pit and the subject was discussed?
A. Not that I remember of; no, sir.
Q. Did you and Albright tease him any about falling into the ash pit?
A. No, sir; not that I remember.
Q. What kind of a night was it?
266 A. Dark, hazy night.
Q. Was it foggy?
A. No, sir; hazy.
Q. You stated something about tracks that you travelled over in going down to the ready track—are the tracks there now the same as at the time of this accident?
A. Yes, sir.
Q. Was not the company making some changes in the yard at this time?
A. No, sir; not since.
Q. Do you mean to say *they have* been no change?
A. No, sir; not that I know of.
Q. Then you tell the jury that the yard at the time of the accident was the same as to the track, lights, location of buildings as it is now—it is now the same as at the time of the accident?
A. Yes, sir.
Q. Where did you say the engine was standing?
A. About middle way of the ash pit.
Q. How many feet from the coal tipple?
A. About one hundred and seventy-five feet.
Q. How far is the coal tipple from the ash pit?
A. About one hundred and twelve feet, as near as I can tell you.
Q. Did you get off of the engine while Whitacre was there?
A. No, sir.
Q. Think about that a little.
A. No, sir; not that I remember of. I may have gotten off while Mr. Whitacre was away to light my head lamp—something like that, but not while he was there.

(Questions are asked in regard to testimony given in other tri
but the Court orders all the testimony stricken out about the tes
mony given elsewhere.)

267 Q. You said, he said something to you about the tin c
and said that he was going for a tin cup, is that what
said?

A. There was something said about a tin cup.

Q. Did you not say that he said that he was going for a tin cu

A. I do not remember.

Q. All that you remember is that something was said about t
tin cup by him?

A. Yes, sir.

Q. That was some months ago?

A. Yes, sir.

Q. When did you hear about the questions of the tin cup?

A. Not until you and him talked to me about it in the room.

Q. That was seven months after the accident?

A. Yes, sir.

Q. You got the ice?

A. Yes, sir.

Q. And put it on the engine?

A. Yes, sir.

Q. For what?

A. For the engine crew to drink.

Q. Who would drink it?

A. Mr. Whitacre, Mr. Albright, and anybody else on the engin

Q. What happens to the water tank or the water when the lid
taken off of the top?

A. Dirt gets into it.

Q. That is the reason you have a double top?

A. Yes, sir.

Q. While you are using the lid to drink out of, the top is e
posed?

268–272 A. You put it back on after you are done drinking.

Q. Then you drink out of this lid and put it back
the cooler again?

A. Yes, sir.

Q. Does the water shake in the cooler very much as the engi
goes along?

A. Yes, sir.

Q. That is very rough?

A. Yes, sir.

Q. That is another reason why they have two tops on it?

A. I can not answer that.

Q. You can not testify as to the exact condition of these lights
this particular night?

A. They were burning.

Q. Can you testify as to the condition of these lights that partic
lar night?

A. They were as good as could be expected for the kind
weather; yes, sir.

Q. A night like this they would not give as good a light as other nights?
A. No, sir; not as good light as on a clear night.
Q. If it had been a clear night without any fog, it would have given better light?
A. Yes, sir.
Q. You could not see the surface of the ground on this night as well as on other nights?
A. I had no trouble?
Q. On this night could you see the surface as well as you could on other nights?
A. Yes, sir.
Q. Without lights?
A. A man could not see the ground as well without lights as with them; no sir.

273 THOMAS O. AMBROSE, a witness of lawful age, produced in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

(By Col. Pearre:)

Q. Your name is what?
A. Thomas O. Ambrose.
Q. Where do you live?
A. Berkeley Springs, West Virginia.
Q. What is your business; and by whom employed?
A. Baltimore and Ohio Railroad as brakeman and extra conductor.
Q. How long have you been with the Baltimore and Ohio?
A. Nine years.
Q. What were you before you were brakeman and extra conductor?
A. I was with my father who is a farmer. I worked on repairs for about three months.
Q. Then brakeman and extra conductor?
A. Yes, sir.
Q. What were you at the time of this accident?
A. Conductor of the crew at the time of this accident.
Q. Regular or extra?
A. Extra.
Q. Where did you live?
A. 15 Boone street, Cumberland.
Q. What time were you called for duty?
A. Got to the yard office about 1:45 and called me for two o'clock.
Q. What crew were you called for?
A. I was called for crew of 869 caboose.
274 Q. Train crew?
A. Yes, sir.
Q. Who constitute the train crew?

A. Conductor, brakeman and flagman.
Q. Who were they?
A. I was the conductor, Mr. H. M. Bohrer, the flagman, and Mr. Whitacre, the brakeman.
Q. Where did you report for duty?
A. At the yard office about 1:45.
Q. How did you get there?
A. I came out Boone street, down Virginia avenue to the railroad, and from there to the middle of the yard to the yard office.
Q. Did you have a lantern?
A. Yes, sir.
Q. What kind of a night was it?
A. It had been raining and was very dark and some little fog.
Q. Did you have any trouble to get down to the caller's office?
A. I did not get down at the caller's office that night. I think I went to the yard office.
Q. Where is the yard office?
A. It stands about middle ways of the yard.
Q. Did you have any difficulty?
A. No, sir.
Q. Sufficient lights?
A. Yes, sir.
Q. What was the condition of the lights that night?
A. The lights on the north side of the yard were burning, but I do not know about the south side.
Q. When you got to the yard office, where did you go?
275 A. I went to the yard office and seen the engine crew that I was called for. They have a card from which you get information in regard to the engine you are called for.
Q. Where did you go?
A. I got the bills for the cars and compared them going down the yard.
Q. Walking?
A. Yes, sir.
Q. How far did you walk?
A. From the yard office to Evitts Creek, which I would suppose would be about forty-five car lengths.
Q. From the yard office to Evitts Creek, to the end of the track right above Evitts Creek, how far would that be in miles or feet?
A. About a quarter of a mile.
Q. Did you have any difficulty in walking down there?
A. No, sir.
Q. When you got down to Evitts Creek what did you do there?
A. Got the head end of the train off of that track.
Q. Who did you find there?
A. No one.
Q. Did not part of your crew arrive for duty?
A. Mr. Bohrer came next.
Q. What was his position?
A. Flagman.
Q. When did the engine come there—engine 4153?

A. I was there ten or fifteen minutes before it arrived.
Q. Do you know when you arrived there in reference to the time that you were to leave?
A. I could not say exactly, but about 2:15 or 2:20.
276-289 Q. When the engine first arrived there, where were you?
A. I was sitting over at the front end of the track where the train was.
Q. Was your train made up?
A. Yes, sir; it was made up partly—we had ten cars.
Q. Mr. Bohrer came?
A. Yes, sir.
Q. When the engine came who was on it?
A. Mr. Whitacre. Dyche and Albright.
Q. What was done there by Mr. Whitacre?
A. The engine went through two crossovers before it got to the train.
Q. What was done by the front brakeman in regard to the crossovers?
A. The brakeman throws the switches and lets the engine in on the track, sometimes we help him.
Q. Did he throw the switches that night?
A. He threw some of them; yes, sir.
Q. How much switching had to be done? Just briefly?
A. It would be about a half dozen switches, I suppose.
Q. Did he throw a part of them?
A. Yes, sir; part of them.
Q. After you got through with switching you had the train made up?
A. We went back to the rear end of the train and pulled down later and coupled up to the head end of the train.
Q. Then what did you do?
A. Started out for Cumbo Yard.

Substituted as per agreement of Attorneys herewith.

"The witness Thomas O. Ambrose, further testified that Whitacre performed a large part of his duties on the way from Evitts Creek, Maryland, to Cumbo Yard, West Virginia, altho he was assisted to some extent by others; that he complained of being sick at a station called 'Hansrote', on the way, and looked sick, and that he made out an accident report there for the company, and that it was a cloudy and foggy night."

290 H. M. BOHRER, a witness of lawful age, produced in behalf of the defendant, being duly sworn, testified as follows:

(By Col. Pearre:)

Q. Mr. Bohrer, you are a brakeman of the Baltimore & Ohio Railroad?
A. Yes, sir.

Q. How long have you been in the railroad business?
A. Fourteen years altogether.
Q. How long with the Baltimore and Ohio?
A. Fourteen years.
Q. Through what grades have you gone?
A. I worked in the shops in the first place and then went t
braking and at the present time I am passenger brakeman betwee
Baltimore and Cumberland.
Q. Do you know Mr. Whitacre?
A. Yes, sir.
Q. You and he were members of the same crew on the night o
the injury?
A. Yes, sir.
Q. June twenty-third, 1913?
A. Yes, sir.
Q. Did you see him that night?
A. Yes, sir.
Q. Where?
A. At Evitts Creek is the first place.
Q. Where was he when you first saw him?
A. When he came down to the engine.
Q. Did you have a talk with him?
A. Yes, sir.
Q. Did he tell you anything about the injury?
291 A. He told me that he fell into the ash pit?
Q. Did he tell you anything else?
A. He told me that he hurt himself.
Q. Did he go into detail to tell you how the accident happened?
A. Not there at Evitts Creek; no, sir.
Q. On that trip?
A. After the trip was finished at Cumbo he told me how he wa
hurt.
Q. How did he say he was hurt?
A. He said that he had stepped into the ash pit and fell acros
a rail and hurt his stomach.
Q. Did you see him on the car going down to Cumbo?
A. I saw him at Evitts Creek.
Q. Did you give him any unusual help that night to perform hi
work?
A. No, sir.
Q. From Cumberland to Cumbo?
A. At Cumbo Yard I left the brakes off of the train which he wa
supposed to do, but I generally let them off there.
Q. Did you do anything else to relieve him that night?
A. No, sir.
Q. Did he ask you to do anything else to relieve him?
A. No, sir.
Q. Did he complain of being unable to do his work?
A. No, sir; but he complained of feeling bad.
Q. He told you something of the accident at Cumbo Yards?
A. Yes, sir.

Q. Anybody else there at the time?

292 A. Mr. Ambrose, Mr. Dyche and I, but I do not know whether Mr. Albright was just present at the time. But there were those in the caller's office.

Q. Did you go into details as to how the accident occurred?

A. No, sir.

Q. Then he did not tell you anything further than he had before?

A. No, sir; he just told me that he had fallen into the ash pit, that was all.

Q. Who constituted the regular train crew to which you belonged, Mr. Bohrer?

A. Mr. Ambrose was the conductor, I was the flagman, Mr. Whitacre was the brakeman and Mr. Dyche was the fireman.

Q. The train crew, I am talking about.

A. The train crew was Mr. Ambrose, myself and Mr. Whitacre.

Q. Were you at any time under the control of Mr. Grove?

A. He was my regular conductor.

Q. This night?

A. Mr. Ambrose was in charge, Mr. Grove was off.

Q. The train crew over which Mr. Grove was conductor, was Grove, Bohrer and Whitacre, is that right?

A. Yes, sir.

Q. Can you state how many times from the first of January, 1913, until on or about the twenty-third of June, 1913, you and Mr. Whitacre were in the same train crew?

A. From what time?

Q. The first of January until the twenty-third of June.

A. Well, we worked together principally all the time. We made anywhere from twenty to twenty-six days per month and sometimes Mr. Whitacre was called off to flag on other crews.

Q. Where did the crew work?

293 A. Between Cumberland and Brunswick—Keyser and Cumberland and Cumbo and Keyser.

Q. How many times do you recall from January first, 1913, to the twenty-third of June, 1913, that you worked out of the South Cumberland Yards to the east—approximately?

A. Well, I really could not say, but we made many trips into Cumberland.

Q. A good many trips?

A. Yes, sir.

Q. Would they be day time or night time or both?

A. Both.

Q. Can you make it a little more definite as to the number of times that you went out of the Cumberland Yards during that period from January first, 1913, to June twenty-third, 1913, to run east?

A. I do not know exactly.

Q. As near as you could feel safe in saying?

A. I would feel safe in saying that we went out of there fifteen times.

Q. With Mr. Whitacre?

A. Yes, sir.
Q. What proportion of these times would be in the night time?
A. I could not say.
Q. One-half of them or one-third of them?
A. I would say in that time we went out of there five or six times at night.
Q. Is that most or least?
A. I judge we went out of there that many times?
Q. Five or six times, did you say?
A. Yes, sir.

294 Cross-examination.

(By Mr. Doub:)

Q. Mr. Bohrer, when you speak of night, I suppose you mean from six P. M. until six A. M. in the morning?
A. When I speak of night I mean between dark and daylight.
Q. When you speak of day time what do you mean?
A. From daylight until dark.
Q. Mr. Bohrer, I believe he told you immediately of this accident when he got down to Evitts Creek Yards?
A. Yes, sir.

Whereupon the following question was asked:

Q. And he told you what he went for when he fell into the ash pit?

To which question the defendant objected, but the Court overruled the said objection, and permitted the questions to be asked and the testimony to be given in evidence, whereupon the defendant objected and prays the Court to sign this its forty-second bill of exception, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

After offering the evidence set out in the aforegoing bill of exceptions, which is hereby made a part hereof as fully as if the same were here incorporated, the said question was asked and the following evidence given:

A. He told me something about a tin cup, but I do not remember whether he told me he was going for a tin cup when he got hurt or not.

And the witness further testified:

Q. Did he say he was hunting the tool boy?
A. No, sir; he did not tell me that.
295 Q. But he told you that he fell into the ash pit when he was going for a tin cup.
A. Yes, sir.
Q. You say that Whitacre had been there five or six times before?
A. Yes, sir.
Q. How often have you been there?

A. Probably more times.
Q. At night?
A. Yes, sir.
Q. You did not know anything about the lights?
A. I knew something about the lights over in the yard, but as far as the lights around the cinder pit I did not know anything about them.
Q. You were off on the regular turn as a conductor during this period for a couple of months, were you not?
A. I believe I run conductor for a month or two during that time.
Q. As a regular conductor? Where did you run from?
A. Between Keyser and Brunswick—Keyser and Cumberland.
Q. Then you were not running out of this particular yard during that period?
A. Somtimes I did. I run between all these points.
Q. Mr. Whitacre was not with you then?
A. I do not remember that he was.
Q. When you first saw Whitacre were his clothes wet?
A. Yes, sir.

Redirect examination.

(By Col. Pearre:)

Q. Did you run from the ready track at all?
A. No, sir.
296 Q. You went from Evitts Creek in from the ready track?
A. From the hump office, this is where I run from. It is the centre of the east-bound yard.
Q. Where did you meet the train?
A. At the hump office.
Q. That did not take you to the ready track that he speaks of?
A. No, sir.

A. R. Bird, a witness of lawful age, produced in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

(By Col. Pearre:)

Q. Your name is what?
A. A. R. Bird.
Q. Where do you live?
A. Cumberland, Maryland.
Q. What is your business?
A. B. & O. conductor.
Q. How long have you been conductor of the B. & O. R. R.?
A. Five years.
Q. What before that?
A. Brakeman.
Q. What before that?

A. Machinist helper.
Q. How long a conductor?
A. Five years.
Q. Do you know Mr. H. W. C. Whitacre?
A. Yes, sir.
297 Q. Have you had him as a part of your train crew at an time?
A. I had him one trip that I remember in June—the 10th.
Q. Will you look at this paper and say in whose hand-writing it i made out?
A. That is a time card in my hand-writing.
Q. What appears there not in your hand-writing?
A. The time called for and the signature of the yard master.
Q. All the balance in your hand-writing?
A. Yes, sir.
Q. Where did you get your information?
A. From the brakeman and flagman.
Q. Where did you get the information that refers to Mr. Whi acre?
A. I got that from him.

(By Col. Pearre:) We now offer this time card.
(By Mr. Doub:) We object.
(By the Court:) What is the date?
(By Col. Pearre:) The tenth day of June, 1913.
(By the Court:) The card may be used as a memorandum t refresh his recollection (which counsel proceeds to do).

Q. Look at that paper and after you have looked at it, pleas state whether or not Mr. Whitacre was a member of your crew o the 10th day of June?
A. Yes, sir. He was a member of my crew on the 10th day o June.
Q. 1913?
A. Yes, sir—1913.
Q. Can you state whether or not he was with your crew at th terminal at Evitts Creek, and if so at what time?
A. Well, he was there at 7:50 P. M.
298 Q. The terminal at Evitts Creek?
A. Yes, sir; the terminal at Evitts Creek, he was also ther at 8:45 P. M., the time we left.
Q. Some delay in your leaving then was there?
A. Yes, sir.
Q. How did he get there, do you know?
A. I could not tell you that? He did not go the road with m
Q. Did he come on the engine?
A. He came from the ready track on the engine.
Q. You saw him on the engine?
A. Yes, sir.
Q. You are familiar with the conditions there?
A. Yes, sir.

Q. How long does it take him to come down there from the ready track on these engines?
A. They come down there in five or ten minutes, if not blocked.

(Cross-examination waived.)

G. M. GROVE, a witness of lawful age, produced in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

(By Col. Pearre:)

Q. Where do you live?
A. Martinsburg, W. Va.
Q. How long have you lived there?
A. All my life.
Q. What is your business?
A. Railroading.
299 Q. In what capacity?
A. Conductor.
Q. How long have you been a conductor and on what road?
A. Twenty-four years on the Baltimore and Ohio.
Q. What were you before you were a conductor?
A. Brakeman.
Q. What before that?
A. Just worked around at whatever I could get to do.
Q. You began as brakeman and then became conductor?
A. Yes, sir.
Q. Do you know Mr. H. W. C. Whitacre?
A. Yes, sir.
Q. How long have you known him?
A. I can not just state—a couple of years.
Q. Did you ever have him in your train crew?
A. Yes, sir.
Q. Regular?
A. Yes, sir.
Q. With whom else?
A. Mr. Bohrer.
Q. What duty did Mr. Whitacre perform—front or rear brakeman?
A. Front brakeman.
Q. Mr. Grove, will you look at the four papers now shown you, dated 1—13—1913, 3—13—1913, 3—25—1913 and 4—30—1913, and state what they are?
A. These are time cards.
Q. Who made them out?
A. I did, sir. This one.
Q. Look at them all. State whether you made them all
300 out?
A. Yes sir; I made them all out.
Q. Where or from whom did you get the information that they contain?

A. What to make them out?
Q. Yes sir. As to the time when the men reported?
A. From the caller in the first place and then from the yar
master.
Q. Where did you get the time that Mr. Whitmore reported?
A. I got it at Evitts Creek.
Q. From whom?
A. From Mr. Whitacre; I generally ask them what time the
were called for.
Q. Will you please look at these time cards and after refreshin
your recollection as to the time when Mr. Whitacre reported, stat
when he reported for duty first on the 13th day of June, 1913?
A. Well, at 7:20.
Q. 7:20 what? P. M. or what?
A. P. M.; yes, sir.
Q. What time did he report for duty on the 13th of March, 1913
A. 12:10 P. M. No, I am a little wrong—yes, this one is right

(By Mr Doub:)

Q. Is 7:20 all right
A. Yes, sir; 7:20 is all right. 2:30 A. M. the 12th and 13th.
Q. On the third and 25th, 1913, which would be the 23rd o
March, 1913?
A. That is ten o'clock P. M.
Q. On the 30th day of April, 1913?
A. That is 12:40 A. M.
Q. After midnight?
A. Yes, sir.
301 Q. Was Mr. Whitacre head brakeman or rear brakeman o
these trips?
A. Head brakeman.

Cross-examination.

(By Mr. Doub:)

Q. These cards you are speaking about do not indicate what te
minal they left from, do they?
A. Yes, sir. I think so. They certainly must.
Q. Take that one now and state whether it does—the card itself
A. Do you want me to state from one terminal to the other?
Q. Is there anything to show from which terminal it left?
A. Yes, sir.
Q. What?
A. 363—that is Cumberland—Evitts Creek.
Q. One of the crew of these trains that you spoke about was M
Bohrer, the man who just left the stand a few minutes ago?
A. Yes, sir.
Q. Did he belong to the same crew?
A. Yes, sir.

Redirect examination.

(By Col. Pearre:)

Q. After looking at the time cards all of them, Mr. Grove, just state what was the terminal from which the train left?
A. Well, this one.
Q. Look them all over and see if they are all the same and cover it all in one answer?
A. Yes, sir; one terminal.
Q. What terminal was that?
A. That was Cumberland—Evitts Creek.

302 JAMES SPEARMAN, a witness of lawful age, produced in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

(By Col. Pearre:)

Q. What is your full name?
A. James L. Spearman.
Q. Where do you live?
A. Cumberland.
Q. How long have you lived in Cumberland?
A. Thirty-seven years.
Q. What is your occupation?
A. Leading hostler for the Baltimore and Ohio Railroad at Cumberland.
Q. How long have you been leading hostler of the Baltimore and Ohio Railroad at Cumberland?
A. Nine years.
Q. In connection with your duties do you have anything to do with the cinder pit in the South Cumberland Yard?
A. Yes, sir.
Q. What do you have to do with it?
A. Work around it all night. I have charge of it.
Q. What position do you hold relative to the other hostlers around there?
A. I am kind of a foreman over them.
Q. When was that cinder pit put in use?
A. The latter part of December, 1912.
Q. Do you know Mr. Whitacre?
A. I met him; yes, sir.
Q. Where did you meet him first?
A. The last of December, 1913.
Q. Where did you meet him then?
303 A. At my house.
Q. Did you have any conversation with him at the time?
A. Yes, sir.
Q. What did he say?
A. He came to my house and inquired about me falling into

the pit. He said a Mr. Myers said I fell into the pit and I said had not; that I had jumped into it one night.

Q. Did he tell you how he came to fall into the pit?

A. He said he walked around an engine standing on that sid and stepped into the pit.

Q. Did he say which side he came from?

A. No, sir.

Q. Did he say which side his engine was standing on or did yo know?

A. Well, his engine stood on the south side. It could not stan on the north.

Q. Did you know what position he occupied as a railroad man?

A. No, sir.

Q. Did you know whether he was a brakeman or conductor?

A. No, sir.

Q. Did he tell you?

A. No, sir.

Q. Tell us how he said he fell into the cinder pit?

A. He said he stepped in back of the tank.

Q. The tank is the tender of the engine, is it not?

A. Yes, sir.

Q. Did he tell you or show you about the location or why h fell in?

A. No, sir. He only said he was about middle ways of th

304 pit.

Q. Which side of the pit did he tell you he fell into?

A. The outside.

Q. Do you mean the north or the south side? The side toward where his engine was or the other side?

(Objection as leading; question changed.)

Q. Mr. Spearman, did he tell you from which side of the pit h fell in?

A. He said he just stepped into the pit—that is all he said.

Q. Did he tell you how he got to the place where he fell in?

A. Not more than walking around.

Q. Around what?

A. The end of the pit.

Q. Did he say what end?

A. No, sir.

Q. He did not say which end of the pit he walked around?

A. No, sir.

Q. Just state the full conversation—what was said by you to hir and what was said by him to you?

A. Mr. Whitacre called at my house the latter part of Decembe and asked me whether I had fallen into the ash pit. He said a Mr Myers had told him that I had. I told him no, that I had jumpe in?

Q. Did you tell him how you jumped in?

(Objection; objection overruled.)

A. I told him that I got up on the upper side of the engine and walked to the right side and got hold of the handle and just slid down and did not look where I was going.

Q. What did he say then?

(Objection; question changed.)

Q. Relate everything that was said between you?

A. I said to Mr. Whitacre that I did not see how he fell into the pit, that there were lights all over his head, and he said they
305 were not burning that night, and I said that I never knew them to be out. He said that the relief had not treated him right and I said why did he not go to some higher people.

Q. Have you stated everything that occurred in the conversation now, Mr. Spearman?

A. Yes, sir; I believe I have.

Q. Were the lights burning that night at the cinder pit?

A. Yes, sir.

Q. Mr. Spearman, do you remember the night that this accident occurred?

A. No, sir. I did not know nothing of it until he came to my house.

Q. Then did you recall anything of it after that?

A. We talked over it among the men on the fire track?

Q. Then did you recall the night when it was said to have occurred?

A. Yes, sir.

Q. Do you know whether the lights were burning that night?

A. Yes, sir. The lights were on full.

Q. Were they always on at night?

A. We had an electric storm there in August that caused some trouble and in December when we had that fire just west of the crossing.

Q. They are the only nights?

A. Yes, sir.

Q. Were you working there on June 23rd, 1913?

A. Yes, sir; I was working there.

Q. At night when the lights are burning, what is the appearance of the surface of the cinder pit there where the water is as compared with the surrounding tracks and ground?

A. The ground out where the tracks are is dark and in where the water is is brown in spots and light at places where you can see the water.

306 Q. How does that happen?

A. The light spots come from light ashes coming out of the fire box.

Q. How is it that certain spots on the water are covered with ashes and other spots you can see the water?

A. It just gather- in spots and does not gather all over the pit.

Q. Can you discover the surface of the water covered with these light ashes from the surrounding tracks?

A. Yes, sir.

Q. Easily?
A. Yes, sir.

Cross-examination.

(By Mr. Doub:)

Q. The crane is not working at night, is it?
A. No, sir.
Q. There are no ashes taken out at night?
A. No, sir.
Q. Ashes are put in at night?
A. Yes, sir.
Q. Is that right?
A. Yes, sir.
Q. And the ashes are put in under the fire track?
A. Yes, sir.
Q. And the water is brown where the ashes go in?
A. Yes, sir; in spots.
Q. What do you mean by spots?
A. Spots here and there and so on.
Q. At the other spots it is clear fresh water?
A. Clear fresh water; yes, sir, and dark water.
307-310 Q. It is all connected together, is it not; the water?
A. Yes, sir.
Q. The tanks are not separated—they fall down into the mid tank?
A. Yes, sir.
Q. When was this conversation?
A. In December.
Q. Six months after the accident?
A. Yes, sir.
Q. And then it was that you told him that you jumped i the pit?
A. Yes, sir.

Substituted as per agreement of Attorneys herewith.

"Thomas R. Rees, called on behalf of the defendant, testified t he was a clerk for the trainmaster at Cumberland, and that he g out the rule books under date of January 1st, 1913, including book No. 722, which he handed to the plaintiff, Whitacre, on 22nd day of March, 1913, and at that time told Whitacre that th would not take effect until all concerned had passed examinati on them, and a general order would be issued making them effecti and that about that time there were given out by him and the assi ant train-master, three or four hundred books."

311 & 312 Substituted as per agreement of Attorneys herewith.

"W. E. Yarnall, a witness produced on behalf of the defenda testified that he was chief clerk to the Superintendent of the Ba more and Ohio Railroad Company at Cumberland, and that Superintendent, Mr. Kelley, on the 28th day of October, 19

issued a general order stating that the book of rules dated January 1st, 1913, would become effective at 12:01 o'clock A. M., November 1st, 1913."

Substituted as per agreement of Attorneys herewith.

313-356 "Drs. C. L. Owens and A. H. Hawkins, witnesses produced by the defendant, testified that the injuries received by the plaintiff were not of a permanent nature, and further gave testimony tending to prove that such injuries were not of as serious a nature as testified to by the physicians called on behalf of the plaintiff."

357 W. P. STARR (Re-Called.)

Direct examination.

(By Col. Pearre:)

Q. You testified that you were the engineer that had charge of the designing and construction of the cinder pit at Cumberland?

A. Not designing, but constructing.

Q. You have had experience in that?

A. Yes, sir.

358 Q. Will you state whether in design and construction that is a safe cinder pit?

A. That is a safe cinder pit; yes sir.

Q. Will you please state whether in the arrangement—the lay out of the yard—taking into consideration the round house, the hump-the coal tipple, etc., this is a safe cinder pit?

A. It could not be safer.

Cross-examination.

(By Mr. Doub:)

Q. Mr. Starr, you were on the stand before?

A. Yes, sir.

Q. I understood you to say that this cinder pit could not be made safer?

A. Yes, sir.

Q. I understood you to mean by that that you could not put guard rails there?

A. Yes, sir. You could, but it would not be practicable.

Q. It would not be practicable to put scaffolding there and widen it and put guard rails there?

A. It could be widened, but it would be so wide that there would be no protection. The direction in which a person would be apt to walk into the pit would be still open.

Q. Could you not close the ends to the same extent that they are closed now?

A. The ends; yes, sir.

Q. If you would close the ends to the same extent that they are now and widen the steel work, there would not be much difficulty?

A. You could not put this railing across the tracks.

Q. What is the reason you could not widen the steel work and then put guards between the uprights and also place at the ends where you say there is danger guard rails so that there is no more space at the ends than there is now?

359 A. That would not be possible. That would be like running a fence along a station platform and leaving the gates open. The only persons who are supposed to go in that yard are persons who are employed there. On the south side of the pit there is no entrance.

Q. Just come to the facts themselves. I am talking about the guards to the cinder pit?

A. There is no occasion whatever for any one that has no business there to go into there.

Q. We are not going into that. We are just talking about the south side of the cinder pit?

A. I am trying to tell you why it could do no good to put railing on the south side of the cinder pit.

Q. That is the best reason?

A. I have not finished. On the south side there is no entrance and there is no other part of the yard and no additional tracks except the two ready tracks and no buildings, while a person going from the north side of the yard where the main part of the yard is and would be apt to loose his bearings and would have to pass over an embankment about six or eight feet above the pit and go on into the cinder pit. There would be no guard rails needed.

Q. There would be an additional safety of one hundred and ninety-eight feet with guard rails in.

A. There would be 198 feet; yes, sir.

Q. And it would be no more expense than it is now?

A. Well, no.

WALTER RILEY, a witness of lawful age, produced in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

(By Col. Pearre:)

Q. What is your name?

A. Walter M. Riley.

Q. Where do you live?

360 A. Cumberland, Maryland.

Q. What is your business?

A. Coal Dock Operator, operating a coaling station for the Baltimore and Ohio Railroad at South Cumberland.

Q. What is a coaling station?

A. It is a large concrete building with four bins which is used to dump the coal for the locomotives as they come into the yard.

Q. Where do you get the coal from?

A. From the hump.

Q. Where are you stationed?

A. Right below the coal tipple.

Q. You run the buckets?
A. Yes, sir.
Q. At what time of the day or night do your duties require you to be there?
A. From six o'clock in the evening until six o'clock in the morning.
Q. Where is your office?
A. In the sand house.
Q. Where is the sand house located with reference to the cinder pit? On which side of the hump with reference to the cinder pit?
A. On the north side.
Q. Are the lights around the cinder pit visible from in front of your office door?
A. Yes, sir.
Q. You can see them?
A. Yes, sir.
Q. Do you recall the night of the accident to Mr. Whitacre?
A. Yes, sir.
361 Q. Who told you about it?
A. I heard about it in the morning in town that there was a trainman fell into the pit and I heard afterwards that it was Mr. Whitacre.
Q. That enabled you to fix the day?
A. Yes, sir.
Q. Were the lights burning that night?
A. Yes, sir. They were burning.
Q. How do you know?
A. Well, if they were not burning it would not have been possible to have operated the coal tipple. If there would be a variation of ten minutes in going down the hump with a car we could not work.
Q. Do these lights furnish light for the cinder pit as well as the coal tipple?
A. Yes, sir.
Q. How high are the lights above the ground?
A. Thirty or forty feet.
Q. How far from the north side of the cinder pit are you engaged?
A. I am engaged on the north side of the cinder pit.

The plaintiff then offered in evidence the Book of Rules, Book 722, January 1st, 1913, to the admission of which Book of Rules in evidence the defendant objected, but the Court overruled the said objection, and admitted the said book of rules in evidence, whereupon the defendant excepted and prays the Court to sign and seal this its forty-fifth bill of exceptions, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

362 & 363 The Book of Rules was then offered in evidence.

After offering the evidence set out in the aforegoing bill of exceptions, which is hereby made a part hereof as fully as if the same were here incorporated, the said Book of Rules was offered in evidence.

And the witness further testified:

Suggestion is made by Mr. Doub to withdraw the rules which were offered (Rules of Apr. 1, 1903).

Mr. Keedy objects to the withdrawal.

(By the Court:) The evidence not having been read to the jury, we think it is competent to strike it out.

To which motion of the plaintiff to withdraw the said Book of Rules, the defendant objected, but the Court overruled the said objection, and permitted the said Book of Rules to be withdrawn from evidence, whereupon the defendant excepted, and prays the Court to sign and seal this its forty-sixth bill of exceptions, which is accordingly done this first day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

The said Book of Rules was then withdrawn from evidence.

After offering the evidence set out in the aforegoing bill of exceptions, which is hereby made a part hereof as fully as if the same were here incorporated, the said Book of Rules being withdrawn, the following evidence was given:

Book 722—January 1st, 1913—is new Rule Book.

Book No. 10367—April 1st, 1903—is old Book of Rules.

Rules of April 1st, 1903, are withdrawn.

Mr. Doub offers page 82 of the old Book of Rules, No. 10367—part of Section 719—under

364 *Plaintiff's First Prayer.*

The plaintiff by his counsel, prays the Court to instruct the jury that if they find from the evidence that the defendant, the Baltimore and Ohio Railroad Company, was and has been since the 23rd day of June, 1913, a corporation duly incorporated under the Laws of Maryland, and further find that upon the 23rd day of June, 1913, the defendant was a common carrier by railroad engaged in carrying freight from the said State of Maryland, in and to the State of West Virginia, and further find that on the 23rd day of June, in the night time of the morning, the day and year aforesaid, the plaintiff, Harvey W. C. Whitacre, was employed by the said defendant railroad company as a front brakeman, and in the discharge of his duties as front brakeman in the defendant's railroad yards at or near the city of Cumberland, Maryland, and assisting in preparing and getting ready one of the defendant's engines and trains to carry and transport freight from the said city of Cumberland, in the State of Maryland, to Cumbo Yard, in the State of West Virginia, and further find that while the said Harvey W. C.

Whitacre was so employed by the defendant as a brakeman on said train, and acting within the scope of his employment as such brakeman, if they so find, he got off the engine and was walking across said yard in the discharge of his duties as such brakeman to said train, in the darkeness of the night time, and fall into a cinder pit and was injured, and that said cinder pit was negligently maintained then and there by the defendant, *(unlighted and without guards and in such condition that the water and ashes concealed said pit)* and that said cinder pit was one of the appliances, works or equipment maintained by the defendant, and that said injury was due in whole or in part to the negligence of the defendant in (*so*) maintaining its said appliance, works or equipment *(as aforesaid)*, then the plaintiff is entitled to recover in this action, and the verdict of the jury must be for the plaintiff *(unless the jury shall further find the facts set forth in the defendant's tenth prayer)*.

(Granted as modified.)

And granted plaintiff's second prayer and plaintiff's third prayer as offered.

365 *Plaintiff's Second Prayer.*

The plaintiff further prays the Court to instruct the jury that if they find a verdict for the plaintiff and in so finding they believe from the evidence that the accident was due entirely to the negligenc- of the defendant, and that the plaintiff in no manner contributed to the accident by any negligence of his own, then in estimating damages the jury are to consider the health and condition of the plaintiff before the injuries complained of as compared with his present condition in consequence of such injuries, and whether the same are in their nature permanent, and how far they are calculated to disable the plaintiff from engaging in those business pursuits for which, in the absence of such injuries he would have been qualified; and also the physical and mental suffering to which he has been subjected by reason of said injuries, and the jury are to allow such damages as in their opinion will be a fair and just compensation for the injuries suffered.

(Granted.)

Plaintiff's Third Prayer.

The jury are instructed that if they find a verdict for the plaintiff, and in so finding believe from the evidence that the accident was caused in part by the negligence of the plaintiff, and in part by the negligence of the defendant, the negligence of both contributing to cause the accident, then in estimating the damages they must subtract from the total damages they may find the plaintiff suffered, calculated according to the plaintiff's second prayer, such sum as they may believe from the evidence was proportionate to the amount

of negligence attributable to the plaintiff in the causing of the accident, that is to say, for illustration: if the jury find that plaintiff's and defendant's negligence were equally efficient causes in producing the accident, then the jury can allow the plaintiff only one-half of the damages they may find he actually suffered by reason of the accident, calculated according to the plaintiff's second prayer, or if they find that the plaintiff's negligence was one-fourth, and the defendant's three-fourths of the total negligence, producing the accident, then the jury can allow the plaintiff the amount of damages they may find he suffered, calculated in accordance with the plaintiff's second prayer, less the one-fourth attributable to
366 him; or if they find the plaintiff's negligence was three-fourths and the defendant's one-fourth, of the total negligence producing the accident, then the jury can allow the plaintiff the amount of damages they may find he suffered, calculated in accordance with the plaintiff's second prayer, less the three-fourths attributable to him, and so on for any other proportionate negligence the jury may find, the above figures being used only for illustration.

(Granted.)

And rejected defendant's first prayer.

Defendant's First Prayer.

The defendant prays the Court to instruct the jury that, under the pleadings in this case, there is no evidence legally sufficient to entitle the plaintiff to recover, and their verdict must be for the defendant.

(Rejected.)

And rejected defendant's second praper as offered and granted defendant's second prayer as modified:

Defendant's Second Prayer.

The jury are instructed that, in order to find a verdict for the plaintiff, they must find from the greater weight of the evidence that the plaintiff was injured while engaged in some act within the scope of his employment, which had some real, (*or*) substantial (*relation to interstate*) traffic over defendant's railroad.

(Granted as modified.)

And rejected defendant's third prayer.

Defendant's Third Prayer.

The defendant prays the Court to instruct the jury that, under the pleadings in this case, there is no evidence legally sufficient to enable

the jury to find any negligence on the part of the defendant, which contributed to the injury complained of, and their verdict must be for the defendant.

(Rejected.)

367 And rejected the defendant's fourth prayer.

Defendant's Fourth Prayer.

The jury is instructed that, if they find that cinder pits of similar construction to the cinder pit of the defendant mentioned in the evidence are usually and generally constructed by railroad companies without guard rails or barriers at or near the sides thereof, then the jury cannot find any negligence upon the part of the defendant from the fact that there were no guard rails or barriers at or near the sides of the cinder pit of the defendant mentioned in the evidence, if the jury shall so find.

(Rejected.)

And rejected defendant's fifth prayer as offered and granted defendant's fifth prayer as modified.

Defendant's Fifth Prayer.

The jury is instructed that, even if they find from the evidence that the cinder pit mentioned in the evidence was dangerous or unsafe, they cannot find for the plaintiff, unless they further find that the defendant was guilty of negligence in either the method of construction of the said cinder pit or in the maintenance or operation thereof and that such negligence, if the jury shall so find contributed to the injury complained of.

(Granted as modified.)

And rejected defendant's sixth prayer.

Defendant's Sixth Prayer.

The jury are instructed that there is no legally sufficient evidence in this case that the plaintiff was injured while he was employed by the defendant in interstate commerce and their verdict must be for the defendant.

(Rejected.)

368 And rejected defendant's seventh prayer.

Defendant's Seventh Prayer.

The jury are instructed that the burden of proof is on the plaintiff in this case to show by the greater weight of the evidence that some

definite act of negligence of the defendant was the primary and proximate cause of the injury complained of.

(Rejected.)

And rejected defendant's eighth prayer.

Defendant's Eighth Prayer.

The jury are instructed that, if they find from the evidence that the plaintiff at the time and place, when and where he suffered the injury complained of, was in the employment of the defendant, and that he was directed by the fireman on the engine mentioned in evidence, if the jury shall so find, to hunt up the tool boy and get a tin cup from him for the use of the crew on said engine, if the jury shall so find, and that the plaintiff, in compliance with such direction of said fireman, left his engine and walked about the yard of the defendant looking for said tool boy, to get said cup, if the jury shall so find, and, while so doing, walked or fell into the cinder pit mentioned in evidence, if the jury shall so find, and was injured, yet their verdict must be for the defendant, unless they further find that the said fireman had authority to give such direction to the plaintiff and that the plaintiff acted upon such direction and not upon his own volition, and the jury are further instructed that there is no evidence in this case legally sufficient to establish that the fireman had authority to give such order or direction, unless they shall find that the engineer was absent from the said engine and left the same in charge of the said fireman.

(Rejected.)

And rejected defendant's ninth prayer.

Defendant's Ninth Prayer.

The defendant prays the Court to instruct the jury that, if they find from the evidence that the construction of the cinder pit in the east-bound yard of the defendant, referred to in the evidence
369 was completed and put in operation on or about January 1st, 1913, and was of modern design and well constructed, and was maintained and operated as cinder pits are usually and generally maintained and operated by railroads, and that the plaintiff, before the injury complained of in this suit, had been employed by the defendant as a brakeman, running in and out of the said east-bound yard of the defendant, for three years next preceding said injury, and during the time of the construction of said cinder pit, and saw the progress of the work thereon, and well knew the location, character and design of said cinder pit, from having seen the same many times, then the plaintiff assumed the risk and danger of falling into said cinder pit, and their verdict must be for the defendant even if they further find from the evidence that said cinder pit was not protected

by guard rails or other barriers on the sides thereof and that the plaintiff fell into said cinder pit and was injured.

(Rejected.)

And rejected defendant's tenth prayer as offered and granted defendant's tenth prayer as modified.

Defendant's Tenth Prayer.

The defendant prays the Court to instruct the jury that, if they believe from the evidence that the cinder pit referred to in evidence was constructed by the defendant, in its east-bound yard after such design and according to such plan as is generally employed by railroad companies reasonably and prudently managed in the construction of such pits (*under similar conditions*), and that such pit was a necessary part of the equipment of the defendant, and was maintained and operated in the same way as such railroads generally maintain and operate such pits (*under similar conditions, as aforesaid*), and that said cinder pit could not be properly and effectually maintained and operated for the purpose for which it was designed, with guard rails on one or both sides thereof, and that said cinder pit was lighted by four arc electric lights (*at the time of the accident*), and that its construction, location and maintenance were well and fully known by the plaintiff, (*and that all the conditions surrounding the plaintiff were then and there such as to enable any one in the possession of his faculties walking in said yard in the*
370 *immediate vicinity to recognize his whereabouts with reference to said pit and to see the pit by the exercise of ordinary care on his part*), then the construction, maintenance and operation of said cinder pit, without guard rails or other barriers, on either side thereof, was not negligence on the part of the defendant, and their verdict must be for the defendant, even though the jury may further find that the plaintiff fell into said cinder pit and was injured because it was not protected on the sides by guard rails or barriers.

(Granted as modified.)

And rejected defendant's eleventh prayer.

Defendant's Eleventh Prayer.

The jury are instructed that, if they find from the evidence that when the plaintiff entered into the service of the defendant and remained therein, after the construction and operation of the cinder pit mentioned in the evidence if the jury shall so find, with knowledge of the location and construction of said cinder pit, with relation to the position of his engine spoken of in evidence on the night of the accident, the plaintiff assumed all the natural and ordinary risks and perils of his employment by the defendant as a brakeman

in and about said yard, and the risk of falling into said cinder pit, and the plaintiff cannot recover for any injury which the jury may find he sustained by falling therein.

(Rejected.)

And rejected defendant's twelfth prayer.

Defendant's Twelfth Prayer.

The jury are instructed, if they find from the evidence that the plaintiff had been in and out of the yard of the defendant in the neighborhood of the cinder pit *in mentioned* evidence as many as twenty times or thereabouts, in the day time, and once at night, between the time when the said cinder pit was put in operation, about January, 1913, and the date of the accident, June 23, 1913, if the jury shall so find, that then the plaintiff had ample opportunity to ascertain and know the location of said cinder pit, with reference to the track on which his engine stood on the night of the acci-
371 dent, and to know that said cinder pit was not protected at the sides by railings or barriers, of any kind, and the jury are further instructed that then the danger of falling into said pit was one of the risks or perils of the employment of the plaintiff, which he assumed in entering into said employment and remaining therein after he had such knowledge of the location and condition of said pit or such opportunity of acquiring such knowledge, and their verdict must be for the defendant.

(Rejected.)

And by a divided Court (Judge Keedy for and Judge Henderson against granting instructions) rejected defendant's thirteenth prayer.

Defendant's Thirteenth Prayer.

The jury are instructed that the rules of the defendant company, offered in evidence, did not give the fireman of the crew of engine No. 4153 authority to order or direct the plaintiff as brakeman to go after the tool boy and get a tin cup for the use of the crew of said engine.

(Rejected by a divided Court—Keedy for, Henderson against granting instructions.)

And rejected defendant's fourteenth prayer.

Defendant's Fourteenth Prayer.

The jury is instructed that, under the pleadings in this case, they cannot find for the plaintiff, unless they find from a preponderance

of all the evidence that the fireman of engine No. 4153 ordered or directed the plaintiff to procure a tin cup for the use of said engine and shall further find that, under the rules or regulations of the defendant in force at that time, the said fireman then and there had authority to give such order or direction to the plaintiff and that it was the duty of the plaintiff to obey such order or direction of the fireman, if they shall find the said fireman gave such order or direction.

(Rejected.)

372 And granted defendant's fifteenth prayer.

Defendant's Fifteenth Prayer.

The jury is instructed that, under the pleadings in this case, there is no evidence legally sufficient to entitle the plaintiff to recover damages for any alleged unskillful or improper treatment of the injuries alleged to have been sustained by him.

(Granted.)

And granted defendant's sixteenth prayer.

Defendant's Sixteenth Prayer.

The jury is instructed that there is no evidence in this case legally sufficient to enable them to find that the fireman of engine No. 4153 had any authority to give any direction or order to the plaintiff or that the plaintiff was required to obey any alleged order of the said fireman, unless they shall find that the engineer of the said engine was absent from the said engine at the time the order is alleged to have been given and said fireman was then and there in charge of the said engine.

(Granted.)

And rejected defendant's seventeenth prayer.

Defendant's Seventeenth Prayer.

The jury is instructed that if they find that the rules and regulations of the defendant offered in evidence from rule book No. 10367 were in force and effect at the time of the happening of injury complain-d of and that the rules and regulations as contained in Rule Book No. 722 were not in force and effect at the said time, then there is no evidence in this case legally sufficient from which they can find that the fireman of engine No. 4153 had any authority to give any order or direction to the plaintiff to procure a tin cup for the use of the crew of said engine.

(Rule Book No. 10367 having been withdrawn by counsel for plaintiff, with leave of Court, the above prayer is rejected.)

373 To which rulings of the Court in granting plaintiff's first prayer as modified, and plaintiff's second prayer and plaintiff's third prayer and each of them, and in rejecting defendant's first prayer and defendant's second prayer as offered, and each of them, and in modifying defendant's second prayer, and in rejecting defendant's third and fourth prayers, and defendant's fifth prayer and each of them as offered, and in modifying defendant's fifth prayer and in rejecting defendant's sixth prayer, seventh prayer and ninth prayer, and defendant's tenth prayer as offered, and each of them, and in modifying defendant's tenth prayer, and in rejecting defendant's eleventh prayer, twelfth prayer and thirteenth prayer, fourteenth prayer and seventeenth prayer and each of them, defendant excepted and prays the Court to sign this its forty-seventh bill of exceptions, which is accordingly done this 1st day of June, 1914.

ROBERT R. HENDERSON. [SEAL.]
M. L. KEEDY. [SEAL.]

Presented to the Court May 23rd, 1914, and re-delivered to counsel for defendant to be submitted to the counsel for the plaintiff for examination.

M. L. KEEDY.

Docket Entries.

In the Circuit Court for Washington County.

No. 109, Tls., Feb. Term, 1914.

HARVEY W. C. WHITACRE
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

1913, Aug. 20: Action; titling; sums. issued; summoned. '13 Oct. 22: Narr filed; rule plea. '13, Dec. 30: Plea; rule repli.; motion and leave to withdraw plea and demurrer. '14, Feb. 5: Demurrer sustained; motion and leave to amend declaration by adding
374 a second count, and second count filed; demurrer to first count sustained; also demurrer sustained as to second count; and motion and leave to amend and same amended by adding a third count filed. '14, Feb. 6: Demurrer to amended nar; demurrer overruled; plea refiled, and issue joined; jury sworn; trial. '14, Feb. 12 Jury disagreed and was discharged; '14, Feb. 14: Suggestion, affidavit and order of Court removing csae to Washington County.

Record from the Circuit Court for Allegany County filed February 21, 1914; trial and verdict for plaintiff and assess the damages at $5,300, March 7, 1914.

Order extending time for filing exceptions filed March 7, 1914.

Judgment on verdict in favor of the plaintiff for the sum of $5,300.00 with interest thereon from the date hereof till paid and costs March 10, 1914; order for appeal to the Court of Appeals filed March 14th, 1914; petition and order of Court for extension of time filed

April 30th, 1914; motion and order for extension of time filed May 29th, 1914; bill of exceptions filed June 2, 1914.

STATE OF MARYLAND,
Washington County, To wit:

I, Edward Oswald, Clerk of the Circuit Court for Washington County, do hereby certify that the aforegoing is truly taken from the record and proceedings in the aforegoing case.

In Testimony Whereof I have hereunto set my hand and affixed the Seal of the Circuit Court for Washington County, at Hagerstown, this 9th day of June, A. D. 1914.

[SEAL.] EDWARD OSWALD, *Clerk.*

A. A. Doub, Frank A. Perdew, Wagaman & Wagaman, Plaintiff's Attorneys.

Geo. A. Pearre, Lane & Keedy, Defendant's Attorneys.

375 *Opinion of the Court of Appeals of Maryland.*

Court of Appeals of Maryland, October Term, 1914.

No. 9, Oct T., 1914. Sides. M. O.

THE BALTIMORE AND OHIO RAILROAD COMPANY
vs.
HARVEY W. C. WHITACRE.

Judge Stockbridge delivered the opinion of the Court.

This Court is now called upon, for the first time, to apply in an action to recover for personal injury, the provisions of the Act of Congress of April 22nd, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in certain cases," The special importance lies in the fact that under that Act the established rules of the common law with regard to contributory negligence, negligence of a fellow servant and assumption of risk were radically modified.

The case presented brings up for review the rulings of the trial Court upon demurrers to the declaration, forty-six exceptions reserved to the admission or rejection of evidence, and one to the action of the Court upon the prayers. It will not be necessary, however, to consider each one of these in detail, four of the bills of exception, the 5th, 17th, 40th and 43rd having been abandoned by the counsel for the appellant in his brief, and the large proportion of the others will be sufficiently dealt with in an expression of the views of this Court upon the Act in question, as applied to this particular case.

The important facts in the case are as follows: Harvey W. C. Whitacre had been for several years an employee of the Baltimore and Ohio Railroad Company as a brakeman, and at the time of the happening of the accident in question, June 23rd, 1913, was what is

known as front brakeman on a freight train, having a run
376 from Cumberland in the State of Maryland to the Cumbo
Yards, near Martinsburg, in the State of West Virginia. The
Railroad was at the time a common carrier, engaged in doing inter
state business, and the employment of Whitacre was in the conduc
of interstate business. On the morning of the day named Whitacr
was called about 1 o'clock, with orders to join a train in his capacity
of brakeman, which was to leave Cumberland at 2 o'clock. In re
sponse to that call, at or about the appointed time, he reported a
the caller's office, and then proceeded through the yard of the rail
road company to join the engine, which was to be coupled to the train
at the Evitts Creek Yard, some half mile distant. The locomotive
was then standing upon a "ready track," and as the brakeman ap
proached it he did not see the engineer, but did see the fireman and
Whitacre put on his working clothes. He then inquired of the fire
man whether he was ready to start, and received the answer, "No
not quite." "The tool boy had not been there and had left him no
tin cup, and he asked me to go and hunt the tool boy and get a tin
cup." This is the testimony of the plaintiff himself. The fireman's
version differs somewhat. Acting upon what the plaintiff under
stood to be the order or request of the fireman he did start to look
for the tool boy and tin cup, and saw at a little distance a moving
light which he followed, supposing it to be a lantern in the hand
of the tool boy. Suddenly the light disappeared around some ob
ject, subsequently ascertained to be an engine. The plaintiff then
took a few steps backward and fell into a cinder pit which was near
the center of the yard, and used for the purpose of raking the cinders
into from the firepan of the locomotive. This cinder pit was of large
size, approximately 180 feet in length by 50 feet in breadth, and
varying in depth from 3½ to 9 feet. It was of recent construction
having been in use but about six months, and was what is known
as a water pit as distinguished from a dry pit. There was
377 no railing around the pit, but at or near the center it was
spanned by iron or steel beams, upon which was worked a
travelling crane, that was used in the day time for the removal of
the cinders from the pit. The allegations contained in the declara
tion, and borne out in the testimony, were to the effect that it had
been raining, that the night was somewhat thick and foggy, and that
the top of the water in the pit was covered to a greater or less extent
with ashes, which made it difficult, if not impossible, to distinguish
it in appearance from solid ground. When the plaintiff fell into
the pit he was wetted up to his waist, and fell across an iron bar or
rail, but clambered out, returned to his engine without the tin cup
and the engine proceeded to the Evitts Creek Yard, where it was at
tached to the cars to be hauled to the Cumbo Yard. The plaintiff
performed a portion, if not all of his regular duties as brakeman,
which involved getting down and coupling and uncoupling the air
pipes between the tender of the engine and the front freight car.
This operation was repeated several times between Cumberland and
the Cumbo Yard. He did, however, while on the trip complain of his
accident to the conductor of the train, and an accident report was

made out at Hansrote, one of the intermediate stations. From the Cumbo yard the plaintiff returned to Cumberland on a passenger train. The following day he consulted a physician, who after examining him found a rupture for which an operation was performed, and from which he recovered. After some months the plaintiff complained of pain in his spine, for which he was treated by applying a white hot iron; and still later there developed what was claimed to be a fracture of the bone of the thigh containing the socket, with which the head of the femur articulates. These are in substance the injuries to recover for which the suit was brought. Some others were set out in the declaration, but not substantiated by the proof.

The declaration in its various counts charges negligence, negligence in the omission to supply the tin cup, negligence in
378 the construction and maintenance of the cinder pit, and inferentially, negligence in allowing the ashes deposited in the cinder pit, or some portion of them, to obey the laws of gravitation, and float on the top of the water.

The grounds upon which liability is denied by the defense are, absence of negligence upon the part of the railroad company, both as to the tin cup and the construction of the pit; secondly, that the risk, if risk there was, was one assumed by the plaintiff when he entered upon the employment, and it was further urged that in leaving the engine and going to look for the tool boy, the plaintiff was doing an act not materially or directly connected with interstate commerce, and that, therefore, the Act of Congress had no application.

The first question to be answered is as to the applicability of the Act of Congress. It is difficult to reconcile the various decisions, even to reconcile those of the same Court. A few propositions, however, are clear. These are, that the Act was intended to apply only in certain cases, thus recognizing that there was a class of cases which might arise between a common carrier by railroad and its employees, in which the Act had no applicability. This was distinctly recognized in the case of the Ill. Cent. R. R. Co. v. Behrens, 233 U. S. 473, in an opinion by Justice Van Devanter, and is further emphasized by Sect. 1 of the Act; "This clause has two branches; the one covering the negligence of the officers, agents or employees of the carrier, * * * and the other relating to defects and insufficiencies in the cars, engines, appliances, etc. But plainly with respect to the latter, as well as the former ground of liability, it was the intention of Congress to base the action on negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiences not attributable to negligence. * * * To hold that under the Statute the railroad company's liability for the injury or death of an employee resulting from any defects or insufficiencies of its cars, engines, appliances, etc., however caused, is to
379 take from the Act the words "due to its negligence." The plain effect of these words is to condition the liability upon negligence." And in any given case the measure of the responsibility of the carrier is that of ordinary care. Seaboard Air Line v. Horton, 233 U. S. 501.

The argument and brief of the railroad Company devoted much

attention to the question of primary negligence; but under the wording of the Act this contention cannot be held sound; if there was any act of negligence upon the part of the Railroad Company, then even though there was contributory negligence upon the part of the plaintiff, or of a fellow servant, and the plaintiff was, at the time of the happening of the accident, engaged in interstate commerce, and there had been no assumption of the risk upon his part, then the Act must be held to apply.

That the plaintiff must be regarded as being engaged in interstate commerce at the time of the happening of the accident seems conclusively settled by two cases. In the P., W. & B. R. R. Co. v. Tucker, 35 App. D. C. 123, subsequently affirmed per curiam by the Supreme Court, Tucker was killed by being struck by an engine when he was on the premises of the defendant, in response to its call to assume the duties he had been engaged by the defendant to assume for their mutual interest and advantage; and it was there laid down that the obligation of the master commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master. In the No. Car. R. R. v. Zachary, 232 U. S. 248, it was held that the acts of an employee in preparing an engine for a trip to move freight in interstate commerce, although done prior to the actual coupling-up of the interstate cars, are acts done while engaged in interstate commerce. In this latter case the party for whose death the action was brought was a fireman on a locomotive of the Southern Railway, he had prepared his engine for the trip and was crossing the railroad yard
380 from his engine to go to his boarding-house; and had passed behind one locomotive, when he was run down by a switching engine on an adjoining track. Certainly the act of the fireman in going to his boarding house was no more an act connected with interstate commerce than was the act of Whitacre in hunting for a tool boy in order to obtain a tin cup for the use of the crew on its trip.

An endeavor was made in the evidence to predicate the act of negligence of the company upon the failure of the tool boy to supply the locomotive with a cup, an attempt which was but partially successful as it was not satisfactorily shown that the tin cup was an absolute essential to the movement of the train, which in fact did move without it, and the evidence of the fireman tended rather to show that even if it had been present, its use, according to individual taste, might have been dispensed with in favor of the lid of the water cooler.

In the prayers which were offered at the conclusion of the case, the tin cup as a negligent omission on the part of the company seems to have been lost sight of, and the negligent act relied on, at this stage, appears to have been the method of construction and maintenance of the cinder pit. There was a practical unanimity of evidence that the pit itself was admirably constructed according to the best modern engineering ideas of what such a pit should be, but the negligence claimed was of two descriptions: one, the insufficient lighting of the pit, in regard to which there was a conflict of evidence whether the electric lights which had been placed there were or were not burning

at the time of the happening of the accident, so as to give a good illumination of the pit; and, second, that the pit was a dangerous appliance for the purposes for which it was designed and used, by reason of the absence of guard rails. Upon this phase also there was a conflict of evidence, that of the plaintiff in support of the dangerous character of the appliance, being the testimony of certain engineers in the nature of what is commonly spoken of as expert testimony.

381 Some of the exceptions to evidence go to the admissibility of this testimony, upon the theory that the dangerous character vel non of the pit as constructed without guard rails, and with water upon which the lighter portion of the ashes might float was a matter so within the common, every-day knowledge of the average citizen that expert evidence was inadmissible. With that contention this Court cannot agree; the construction of railroad cinder pits is not a matter with which the average individual is so brought in contact in his daily life as to be necessarily familiar with what is and what is not practicable and proper, as to exclude evidence of an expert character. Furthermore, it appears that only a very small number of water pits have been built thus far in this country. How they may compare with dry pits in the element of danger is known to but few and is clearly without the range of the ordinary experience of the individual. It was, therefore, proper to admit this evidence, as was done, and there was thus raised by the testimony a distinct issue, as to the negligence of the defendant, the Railroad Company, in the construction and maintenance of the pit.

Did the plaintiff, Mr. Whitacre, assume this risk? The rule has been frequently laid down, both in this State and elsewhere, upon this subject, and is well stated in the case of Wood vs. Heiges, 83 Md. 257; that a person assumes all risk of all dangers which are open and obvious, but not dangers which arise from the negligence of the master, unless after knowledge of such danger the servant continues with full knowledge to perform his work. The rule was given its fullest application in the Seaboard Air Line R. R. v. Horton, 233 U. S. 492, where the guard glass over the boiler gauge in the cab of a locomotive was missing, and was reported as missing by the engineer to his superior seven or eight days before the happening of the accident, and though the missing guard glass was not supplied, the engineer continued to run his engine, and was injured by the

382 bursting of the gauge, and the engineer was held by continuing to work without the replacement of the guard glass to have assumed the risk incident to its absence. And a similar case is that of Byers vs. The Coal Co., 230 Pa. 10; although in this latter case the Act of Congress was in no way involved. See also So. Ry. v. Crockett, 234 U. S. 730.

In the case under consideration the plaintiff had been into the Cumberland yard in connection with his work on a number of occasions; certainly once at night, and knew or must have known of the existence there of the cinder pit; but the performance of his duties was not at the cinder pit, nor was he necessarily placed in the position with relation to it where he must be construed by law to have known

whether it was a dangerous appliance or not, and he had the right
assume, that as constructed it was a proper and safe appliance. Up
this branch of the case the Act of Congress has no application, b
cause Sec. 4 by its terms applies only in a certain class of cases,
which this is not one, and if we take the rules as applied in the Sta
Courts, the risks which are assumed by an employee are those inc
dent to, or connected with, the work which the employee perform
not those which may exist in other portions of the establishment
yard where he himself has no duties and where he has the right
rely upon the master's having performed his entire duty. In th
case of McCann v. Atl. Mills, 20 R. I. 566, relied upon by the appe
lant, and which is the case most nearly approaching this in its fac
the Court did say, that "it was the duty of the employer to furni
his employees drinking water, but the fact that it was not so fu
nished does not warrant the plaintiff in wandering about a yard
the darkness in search of it, at any one's risk except his own"; t
Court, however, in deciding the case places its decision not upon t
assumption of risk, but of the contributory negligence of the plai
tiff. So in this case, the act of the plaintiff in going about the yea
as he did, was one to be viewed rather as contributory neg
383 gence than an assumption of risk, and that aspect of the ca
was fully and properly covered by the plaintiff's third pray

From what has been said, it follows, that no reversible error
found in the rulings of the trial court upon the demurrer to the d
laration, or the 1st, 2nd, 3rd, 4th, 9th, 10th, 18th, 19th, 20th, 21
22nd, 25th, 27th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37t
38th, 39th, 42nd, and 46th exceptions to evidence. The 7th exce
tion was to permitting the plaintiff to testify with regard to prom
tions in the service; at best the question was immaterial, and no i
jury has been pointed out or is apparent from the admission of th
evidence by the Court.

The 8th exception was to the exclusion upon cross-examinati
of the plaintiff of the question, whether his wife had died of tub
culosis. This was also immaterial to any issue raised in the case.

The 11th and 12th exceptions were taken to the admission by t
court of the evidence of an insurance expert, in giving from l
tables the value of an income, such as the plaintiff was receiving
the time of the accident. This evidence was of course intended a
guide for the jury in determining the proper amount of damag
to be awarded. Without some evidence in regard to this before t
jury, there was no basis except vague speculation on which to b
any verdict. The insurance tables of expectancy, based upon actu
experience of the large life insurance companies, while not conc
sive, have been recognized to be the best character of evidence
tainable for such purposes, and the evidence objected to by these t
exceptions was properly admitted.

This is quite different from the objection raised in the 44th exc
tion, where the court refused to permit a physician to express
opinion upon the prospect of the life of the plaintiff; there had be
nothing to show upon what any such opinion might be form

whether it was the result of professional observation from
384 long years of continuous practice, or upon the occupation of the plaintiff, or what circumstances he might or might not have considered in reaching his opinion, and the Court acted properly in excluding his evidence.

The 13th, 14th, 15th, and 16th exceptions all related to the taking of an X ray photograph of the hip bone, which was claimed to have been fractured,—whether the angle at which taken would or would not tend to disclose or conceal any such fracture. Evidence had been given by physicians of the fact of fracture, discovered by manipulation, but the use of photography in cases of this character is now so universally recognized, that it is properly regarded as evidence of the strongest sort in any such case, and yet as is well known the lights or shadows produced by the angle of light may make a material difference in the appearance; it was, therefore, entirely proper that the witness should be fully examined upon this point.

There were a number of other exceptions to evidence, and while with regard to some of them the correctness of the ruling of the court is not as clear, none of them disclose such injury to the plaintiff as to justify a reversal.

The last exception was to the rulings of the court upon the prayers; of these, three were offered on the part of the plaintiff, and seventeen upon the part of the defendant.

The plaintiff's first prayer, submitted to the jury, in the form in which it was modified by the court, the question of the negligence of the railroad company, and as modified, when taken in connection with the defendant's tenth prayer, fully placed before the jury the issue of negligence upon the part of the defendant as an essential element to the recovery, and is not open to the criticism suggested by the defendant.

The plaintiff's second prayer was the customary prayer as to the measure of damages, and the third prayer was upon the apportionment of damages between the plaintiff and defendant, with respect to the finding of the jury as to negligence and contributory negligence, in strict accordance with the Act of Congress. While this prayer is a new one in this State, yet it seems to have been drawn with peculiar care, and is not open to objection.

385 The first and third prayers of the defendant were prayers to take from the jury. But since there was some evidence tending to show negligence on the part of the Railroad company they were properly rejected. The defendant's fourth prayer was to the effect, that if the pit in question was constructed in a similar manner to those constructed by other railroad companies, that then the jury could not find any negligence in its construction. This was manifestly a bad prayer. The court was not concerned with the question whether other railroads were or were not negligent in their appliances, but whether the Baltimore and Ohio was, and the mere fact that the mode of construction followed that done by another company, and which may or may not have been a safe and proper appliance, could form no basis to relieve the Baltimore and Ohio com-

pany from liability in case the jury found negligence in the con
struction and maintenance of this pit.

The defendant's fifth prayer was granted with a modification; bu
what that modification was is not indicated in the record, and th
reading of the prayer does not disclose anything in it which coul
operate to the disadvantage of the defendant.

The defendant's sixth, seventh, eighth, ninth and eleventh prayer
have been sufficiently covered by what was said in the general di
cussion of the case and need not be further considered.

The defendant's twelfth prayer was properly rejected because th
10th prayer, which had been granted with modifications, sufficientl
covered the same matter, and the granting of it would have tende
to confuse the jury.

The thirteenth, fourteenth and sixteenth prayers of the defendar
all involve a construction by the jury of the rules of the company
and therefore were properly refused, such construction being a ma
ter for the court and not for the jury.

The seventeenth prayer of the defendant was based in part upo
certain rules of the company which had been offered in evidence an
subsequently withdrawn, and being withdrawn from evidence n
prayer could properly be granted, which involved a conside
386 ation of that which was not in the case.

Finding no reversible error, the judgment appealed fro
will be affirmed.

Judgment affirmed, with costs.

Filed January 6th, 1915.

387 "Whereupon the following judgment of the Court was e
tered, to wit:

"1915, January 6th, Judgment affirmed, with costs. Opinio
filed January 6th, 1915. Op. Stockbridge, J."

Petition for Writ of Error to the Supreme Court of the United State

In the Court of Appeals of Maryland.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant,
vs.
HARVEY W. C. WHITACRE, Appellee.

Petition for Writ of Error and Supersedeas.

To the Honorable the Court of Appeals of Maryland:

The appellant in the above entitled cause, feeling itself aggriev
by the judgment entered against it by the Court of Appeals of Mar
land, comes now by George E. Hamilton and George A. Pearre,
attorneys, and prays for an order allowing said appellant a writ
error to the said Court of Appeals of Maryland, under and accordi
to the laws of the United States, and also that an order be made fixi

the amount of security which the appellant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in said Court shall be suspended and stayed until the determination of said writ of error.

388 And your petitioner will ever pray.

GEORGE E. HAMILTON,
GEORGE A. PEARRE,
Attorneys for Appellant.

Filed February 5th, 1915.

Whereupon the Court passed the following order, to wit:

Writ of error allowed in this cause upon the execution of a bond in due form of law by the Baltimore and Ohio Railroad Company, and a security or securities, in the sum of seven thousand dollars; said bond, when approved, to act as a supersedeas.

Dated at Annapolis, Maryland, this 29th day of January nineteen hundred and fifteen.

A. HUNTER BOYD,
Chief Judge of the Court of Appeals of Maryland.

Filed February 5th., 1915.

389 *Assignment of Error.*

In the Court of Appeals of Maryland.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant,
vs.
HARVEY W. C. WHITACRE, Appellee.

Assignment of Error.

To the Honorable Court of Appeals of Maryland:

Comes now the appellant, The Baltimore and Ohio Railroad Company, and files the following assignment of error upon which it will rely upon its prosecution of the writ of error in the above entitled cause.

First. That the Court of Appeals of Maryland erred in holding, on the facts of this case, that the appellant was negligent under the provisions of the Federal Employers' Liability Act of 1908.

Second. That the said Court erred in holding that on the facts of this case the doctrine of assumption of risk did not apply.

Third. That the said Court erred in holding that the Employers' Liability Act of 1908 has no application in this case insofar as the doctrine of assumption of risk is concerned and that said doctrine, as applied by the State courts, governs.

390 "Wherefore, the said Baltimore and Ohio Railroad Company, Appellant, prays that the said Judgment of the Court of Appeals of Maryland be reversed and that the said Supreme

Court of the United States may cause further to be done therein to correct the errors what of right and according to the laws and customs of the United States should be done."

GEORGE E. HAMILTON,
GEORGE A. PEARRE,
Attorneys for Appellant.

Ordered as prayed this 11th day of February 1915.

A. HUNTER BOYD,
Chief Judge, Court of Appeals of Maryland.

Filed February 5th. 1915.

Bonad and Approval Thereon.

Know all men by these presents, That we, the Baltimore and Ohio Railroad Company, a body corporate, as principal, and The Equitable Surety Company, a corporation, as surety, are held and firmly bound unto Harvey W. C. Whitacre in the full and just sum of Seven thousand dollars ($7,000.00), to be paid to the said Harvey W. C. Whitacre, or his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents. Sealed with our seals and dated this 30th day of January, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a session of the Court of Appeals of Maryland in a suit depending in said Court, between the said Harvey W. C. Whitacre, plaintiff, and The Baltimore and Ohio Railroad
391 Company, defendant, a final judgment was rendered against the said defendant, and the said The Baltimore and Ohio Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Harvey W. C. Whitacre citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date thereof.

Now, the condition of the above obligation is such, That if the said the Baltimore and Ohio Railroad Company shall prosecute its Writ of Error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By GEO. F. RANDOLPH, *First Vice-President.*

[Seal's place.]

Attest:
C. W. WOOLFORD, *Secretary.*

[Seal's place.]

EQUITABLE SURETY COMPANY,
By WM. M. MURPHY, *Att'y in Fact.*

Attest:
A. P. WEAVER.

Approved by—
A. HUNTER BOYD,
Chief Judge, Court of Appeals of Maryland,
This 30th Day of January, 1915.

Filed February 5th., 1915.

92 *Agreement & Stipulation.* .

In the Court of Appeals of Maryland, October Term, 1914.

No. 9.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant,
vs.
HARVEY W. C. WHITACRE, Appellee.

This agreement and stipulation made this 8th day of February, 915, by and between the Baltimore and Ohio Railroad Company, ppellant in the above cause, and Harvey W. C. Whitacre, Appellee, itnesseth, that,

Whereas, the Clerk of the Court of Appeals of Maryland is about prepare a copy of the record in the above cause, at the instance the Baltimore and Ohio Railroad Company in the prosecution its writ of error to the Supreme Court of the United States, and e said parties desire to enter into this stipulation for the purpose setting forth the portions of the record which shall constitute e transcript of the record for the writ of error, and the Clerk said Court shall transmit the portions designated in this stipu-tion.

It is hereby agreed between the said parties, that the Clerk of e Court of Appeals shall incorporate in the record for the writ error, the entire transcript of the record of said case, except such rtions thereof as hereinafter designated.

First. He shall omit from the record all the testimony of Drs. nomas W. Koon, G. L. Broadrup, James T. Johnson and J. H. picer, from page 76 to page 79, inclusive, and from page 84 to page 7, and instead thereof shall substitute on page 76, at the con-usion of the testimony of H. W. Clark, the following

"Drs. Thomas W. Koon, G. L. Broadrup, James T. John-3 son and J. H. Spicer, called on behalf of the plaintiff, testi-fied that upon examination of Harvey W. C. Whitacre, the intiff, after the accident testified to, they found that he was ffering from a fracture of the hip and displacement of the head the femur, on account of the spreading of the ascetabulum or cket, caused by the fracture, which caused it to widen when his ight was put upon it, and which was very painful, and that as a

result ankylosis of the spine had developed, and that these injuries were permanent, and that he would not be able to resume his usual occupation, and that there was probability that the disability would increase as he would continue to put his weight upon the leg, and that he also suffered from congestion of a portion of the right lung."

Second. He shall omit from the record all of the testimony of H. C. McAdams, including the train sheet, from page 133 to page 140, and substitute in place thereof, at the end of the testimony of Mr. Ferguson on page 133, the following:

"The plaintiff then offered in evidence the train sheet, showing the movement of the train on which the plaintiff was employed the night of the accident, and H. C. McAdams, a witness called on behalf of the plaintiff, who was train-master at Cumberland for the defendant company, in explanation of the train sheet, stated that the train was carried by engine No. 4153, of which Ambrose was conductor and Albright was engineer, and that the engine crew was called for 1:45 A. M., and the train crew for 2:05 A. M.; that the tonnage was 5019 tons, and that the train left Evitts Creek, at the east end of the Cumberland yards, at 2:51 A. M., and arrived at Hansrote at 5:27 A. M., and left at 6:28 A. M., and arrived at Sleepy Creek, West Virginia, at 8:40 A. M., and left at 8:53 A. M., and that the train crew was relieved from duty at its destination, at 11:30 A. M., and the engineer was relieved at 11:40 A. M., and that the crew was paid from the time at which they were called to go to work; that the engine crew, including the plaintiff, were required to report at the engine, while the train crew were to report down at the Evitts Creek yard."

Third. He shall also omit the testimony of H. C. McAdams beginning at the end of page 143 and ending in the middle of page 145.

394 Fourth. He shall omit from the record the testimony of M. C. Albright, from the top of page 238 to the bottom of page 245.

Fifth. He shall omit that part of the testimony of John Dyche, beginning with the question, "Where did you first go?", at the bottom of page 256, and ending with the answer, "Several times," at the bottom of page 260 of the record, and he shall also omit that portion of his testimony from the top of page 269 to the bottom of page 272.

Sixth. He shall omit all that part of the testimony of the witness Thomas O. Ambrose, beginning with the question, "Who coupled the engine to the train?", at the bottom of page 276, down to the end of his testimony at the bottom of page 289, and as a substitute therefor shall insert at the bottom of page 276, the following:

"The witness Thomas O. Ambrose, further testified that Whitacre performed a large part of his duties on the way from Evitts Creek, Maryland, to Cumbo Yard, West Virginia, altho he was assisted to some extent by others; that he complained of being sick at a station called 'Hansrote', on the way, and looked sick, and

t he made out an accident report there for the company, and t it was a cloudy and foggy night."

eventh. He shall also omit the testimony of Thomas R. Rees, inning at the middle of page 307, and ending at the bottom page 310, and as a substitute therefor shall insert at the middle page 307, after the testimony of James Spearman, the following: Thomas R. Rees, called on behalf of the defendant testified he was a clerk for the train-master at Cumberland, and that gave out the rule books under date of January 1st, 1913, includ- the book No. 722, which he handed to the plaintiff, Whitacre, the 22nd day of March, 1913, and at that time told Whitacre they would not take effect until all concerned had passed exami- on on them, and a general order would be issued making them tive, and that about that time there were given out by him and the assistant train-master, three or four hundred books.

Eighth. He shall also omit the testimony of W. E. Yarnall, beginning at the top of page 311, down to the middle page 313, and as a substitute therefor shall insert at the top of 311, the following:

W. E. Yarnall, a witness produced on behalf of the defendant, fied that he was chief clerk to the Superintendent of the Balti- e and Ohio Railroad Company at Cumberland, and that the erintendent, Mr. Kelley, on the 28th day of October, 1913, is- a general order stating that the book of rules dated January 1913, would become effective at 12:01 o'clock A. M., November 1913."

inth. He shall also omit the testimony of Dr. C. L. Owens from 313 to page 326, and the testimony of Dr. F. W. Foughtman page 326 to page 332, and on page 336 and page 357, and the testimony of Ethel Matlick on page 336 down to page 339, the testimony of Dr. A. H. Hawkins from page 339 to page inclusive, and also on page 357, and as a substitute therefor, he middle of page 313, shall insert the following:

Drs. C. L. Owens and A. H. Hawkins, witnesses produced by defendant, testified that the injuries received by the plaintiff not of a permanent nature, and further gave testimony tend- to prove that such injuries were not of as serious a nature as fied to by the physicians called on behalf of the plaintiff."

enth. He shall also omit the testimony of M. E. Mullen, from 332 to page 336.

eventh. He shall also omit the rules set forth on page 363 of record.

GEORGE A. PEARRE,
Attorney for Appellant.
ALBERT A. DOUB,
Attorney for Appellee.

led February 11th. 1915.

396 UNITED STATES OF AMERICA, *ss:*

[Seal United States District Court Maryland.]

The President of the United States of America to the Honorable the Judges of the Court of Appeals of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of Maryland before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Baltimore and Ohio Railroad Company, Appellant, and Harvey W. C. Whitacre, Appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Constitution, or any treaty or statute
397 of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said The Baltimore and Ohio Railroad Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 29th day of January, in the year of our Lord one thousand nine hundred and fifteen.

ARTHUR L. SPAMER,
Clerk District Court of the United States for the District of Maryland.

Allowed by
A. HUNTER BOYD,
Chief Judge of the Court of Appeals of Maryland.

Test:

[Seal Court of Appeals, Maryland.]

C. C. MAGRUDER, *Clerk.*

Filed February 5th. 1915.

398 [Endorsed:] Supreme Court of the United States, October Term, 1914. The Baltimore and Ohio Railroad Company vs. Harvey W. C. Whitacre. Writ of Error & Order of Court. Filed February 5" 1915.

399 UNITED STATES OF AMERICA, *ss:*

To Harvey W. C. Whitacre, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of Maryland wherein The Baltimore and Ohio Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable A. Hunter Boyd Chief Judge, of the Court of Appeals of Maryland, this 29th day of January, in the year of our Lord one thousand nine hundred and fifteen.

A. HUNTER BOYD,
Chief Judge of the Court of Appeals of Maryland.

Filed February 5th., 1915.

Test:

[Seal Court of Appeals, Maryland.]

C. C. MAGRUDER, *Clerk.*

400 Service of the within Citation acknowledged this — day of ——, 1915.

I hereby acknowledge and accept service of the within citation, this first day of February, in the year 1915.

FRANK A. PERDEW,
ALBERT A. DOUB,
Attorneys for Harvey W. C. Whitacre, Appellee.

Filed February 5", 1915.

401 STATE OF MARYLAND:

I, C. C. Magruder, Clerk of the Court of Appeals of the State of Maryland, do hereby certify that the said Court is the highest Court of Law and Equity in said State in which a decision can be had.

I further certify that the aforegoing is a true transcript of record, opinion of the Court and judgment entered thereon, petition for writ of error, assignment of errors and order of Court thereon, and bond with approval thereon endorsed and agreement of attorneys in the case there stated.

And in obedience to the command of the within writ I now transmit said transcript of record together with the original writ of error and the original citation attached in said cause to the Supreme Court of the United States.

In testimony whereof, I hereunto subscribe my name and the seal of the Court of Appeals of Maryland affix this twenty-fifth day of February A. D. 1915.

[Seal Court of Appeals, Maryland.]

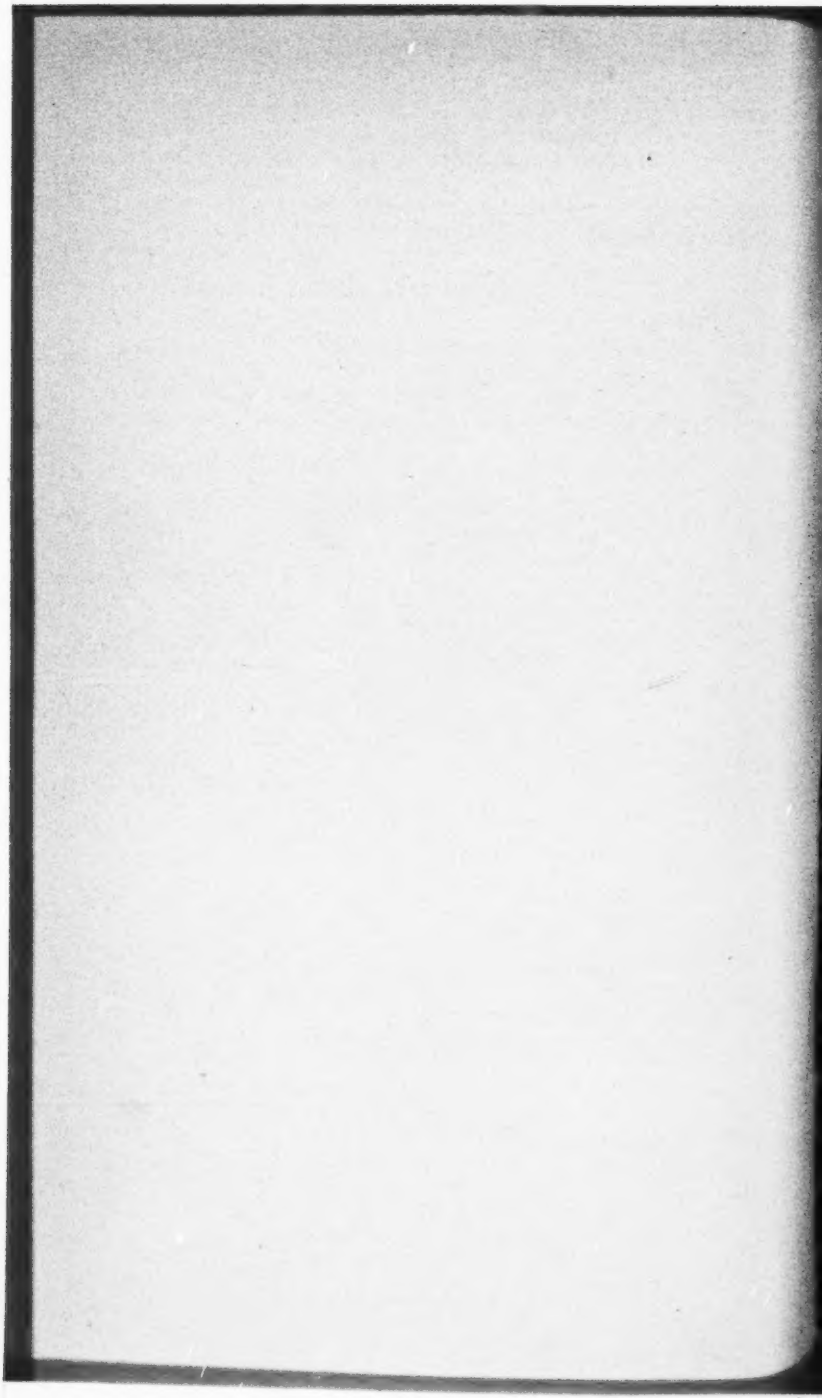
C. C. MAGRUDER,
Clerk of the Court of Appeals of Maryland.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled Feby. 25th, 1915, C. C. M., Cl'k.]

Appellant's costs.		Appellee's costs.	
Record	$462.50	Brief	$76.00
Brief		Attorney	10.00
Attorney	10.00	Clerk	1.55
Clerk	1.30		
	$473.80		$87.55

Cost of this record....$139.65

Endorsed on cover: File No. 24,590. Maryland Court of Appeals. Term No. 374. The Baltimore & Ohio Railroad Company, plaintiff in error, vs. Harvey W. C. Whitacre. Filed February 26th, 1915. File No. 24,590.



IN THE

Supreme Court of the United States,

OCTOBER TERM, 1915.

No. [redacted] 71

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Plaintiff in Error,

vs.

HARVEY W. C. WHITACRE,

Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF OF PLAINTIFF IN ERROR

GEO. A. PEARRE,
DUNCAN K. BRENT,
A. HUNTER BOYD, JR.,
GEO. E. HAMILTON.
Attorneys for Plaintiff in Error.

J. H. FURST COMPANY, PRINTERS AND PUBLISHERS, BALTIMORE.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1915.

No. 374

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Plaintiff in Error.

vs.

HARVEY W. C. WHITACRE.

Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF OF PLAINTIFF IN ERROR

This is an action brought by the defendant in error, hereinafter called the plaintiff, in the Circuit Court for Allegany County, Maryland, against the plaintiff in error, hereinafter called the defendant, under the provisions of the Federal Employers' Liability Act (Comp. Stat. 1913, Sec. 8662), to recover damages for personal injuries sustained through a fall into a cinder pit in a railroad yard on the night, or rather during the early morning hours of June 23, 1913.

The allegation of negligence in the declaration as originally filed is that:

> "(Plaintiff) stepped across the said yard in order to procure a tin cup for the use of himself and the other trainmen on the said train of cars, which was necessary for the use of said trainmen as employes of the said road, to carry on the engine of said train; and while the said plaintiff was then and there in the said yard, and in the exercise of due care passing along said yard in the night time, he fell into a cinder pit, which was built and negligently maintained in the said yard of the said defendant; said cinder pit being filled with water, and the top thereof being covered with ashes, so that the cinder pit was concealed in the darkness and the plaintiff could not see the pit and avoid the dangerous place, and that the said plaintiff was then and there exercising due care and caution on his part, but that the said cinder pit was not protected by railing or otherwise, but was negligently maintained by the defendant, and was a dangerous appliance maintained by the said Railroad Company in the said yard; * * * all of which injuries were caused by reason of the negligence of the defendant and its agents in so carelessly and negligently maintaining the said cinder pit without adequate protection for the said employees."
>
> (Record, pp. 2 and 3).

To this declaration the defendant pleaded the general issue, but subsequently by leave of court, withdrew its plea and demurred (Record, p. 4).

The demurrer was sustained, and a second count, similar to the first count but containing a specific reference to the Federal Employers' Liability Act, and a statement that the defendant "negligently failed to provide" (the tin cup), was added to the declaration, to which second

count the defendant demurred and again the demurrer was sustained.

(Record, p. 4).

A third count was added in which the negligence charged was:

> "that in order to enable the crew of the freight trains of the defendant so engaged in interstate commerce properly and safely to transport such trains, it was the custom, usage and duty of the defendant to provide drinking water in a cooler on the tanks of all engines attached to trains engaged in interstate commerce, and also to provide tin cups for the use of the train crew in charge of all such trains so used in interstate commerce, and that the said defendant had in its employ a person whose duty it was to provide all such engines with drinking water and drinking cups for the use of their respective crew during the period of transportation of said trains from the State of Maryland to the State of West Virginia, which drinking cups were owned and kept in the store room of the defendant in the round house in said yard, and the defendant provided said cups and said drinking water because it knew that the crews of said trains were not willing to transport said trains unless the said defendant provided such drinking water and tin cups for the use of said crew, and so to enable them the better and the more safely and the more comfortably to transport said trains, and that on the night aforesaid the defendant's servant, whose duty it was, under his employment, to provide and place one of said tin cups on said engine, in connection with which the said plaintiff was employed, failed and neglected to provide such cup and place the same on the said engine for the use of said crew; and that because of the failure of the said servant so to provide said cup for said engine, it then and there became and was the duty, according to custom, usage and the re-

quirement of said company and its needs to see that a cup was provided; and that, according to the rules of said company, it was the duty then and there of each member of said crew, not only to discharge the special and regular duties imposed upon him, but any other duties which any member of said crew might discover had been neglected by any servant of said company which might be necessary for the movement of said train; and that the said plaintiff, under the rules of the said company, was then and there subject to the orders of the conductor of said train, or in his absence to the order of the engineer of said train, or in his absence to the orders of the fireman of the said engine, and that the conductor being absent and the engineer being absent, upon the discovery by the fireman of said engine attached to said train, that said cup had not been provided, the plaintiff was ordered and directed by the fireman of said engine, who was then in charge of said engine, to look up and search for the servant of said company who had charge of said cups, and to secure a cup and place the same on the said engine; and that the said plaintiff, in discharge of his duties, and acting under the direction of said fireman, and within the scope of his employment, stepped a few feet from said engine toward said round house or store room in search of said servant who had charge of said cups, for the purpose of securing such cup and placing the same on such engine, for the use of said crew, before the said train started on its way from the City of Cumberland, Maryland, to the State of West Virginia; and that while the said plaintiff, in the exercise of due care, was then and there in said yard, and near said engine and looking for said servant who had charge of said cups, in the night time, on the said 23d day of June, 1913, he suddenly fell into a large cinder pit, which was

built and negligently maintained in the said yard of the said defendant, which pit is and was situated in the central portion of said yard, where it is surrounded by tracks for trains used for purposes of interstate traffic, and where employes of defendant are required in numbers from time to time, both in the night and in the day, in the discharge of their duties in the movement of trains and for other purposes; said cinder pit being filled with water, and the top thereof being covered with ashes, so that the cinder pit was concealed in the darkness and the plaintiff could not see the pit and avoid the dangerous place, and that the said plaintiff was then and there exercising due care and caution on his part, but that the said cinder pit was not protected by railing or otherwise, but was negligently maintained by the defendant, and was a dangerous appliance maintained by the said railroad company in the said yard, * * * all of which injuries were caused by reason of the negligence of the defendant and its agents in so carelessly and negligently maintaining the said cinder pit without adequate protection for the said employes."

(Record, pp. 7-9).

A third demurrer being interposed and overruled, the general issue plea was refiled and issue was thereon joined (Record, p. 9).

The case was tried in the February term, 1914, of the Circuit Court for Allegany County, and the jury disagreed and was discharged February 14, 1914 (Record, p. 166).

Thereupon the case was removed to the Circuit Court for Washington County, and immediately retried. This retrial resulted in a verdict for the plaintiff on March 7, 1914, and the jury assessed the damages at $[illegible].00 (Record, p. 166).

Judgment was entered on this verdict and the defendant appealed therefrom to the Court of Appeals of Maryland (Record, p. 10), which Court affirmed the judgment. In an opinion by Judge Stockbridge (Record, pp. 167-174), the Court of Appeals decided that "the rule as applied in the State Courts" must determine the question of the plaintiff's assumption of risk of falling into the cinder pit. The reason given for this, is that the Federal Employers' Liability Act has no application in this case to the doctrine of Assumption of Risk, as the facts do not bring the case within the provisions of Section 4 of the Act. Judge Stockbridge expresses this theory as follows:

> "Upon this branch of the case (assumption of risk) the Act of Congress has no application, because Sec. 4 by its terms applies only in a certain class of cases, of which this is not one, and if we take the rules as applied in the State Courts, the risks which are assumed by an employee are those incident to, or connected with, the work which the employee performs, not those which may exist in other portions of the establishment or yard where he himself has no duties and where he has the right to rely upon the master's having performed his entire duty."
>
> (Record, p. 172).

The case is now before this Court on a writ of error to the Court of Appeals of Maryland allowed by Chief Judge A. Hunter Boyd.

ASSIGNMENTS OF ERROR.

The defendant specifies and relies upon the following assignments of error:

ASSIGNMENT OF ERROR NO. 1.

That the Court of Appeals of Maryland erred in holding, on the facts of this case, that the defendant was negligent under the provisions of the Federal Employers' Liability Act of 1908.

ASSIGNMENT OF ERROR NO. 2.

That the said Court erred in holding that on the facts of this case the doctrine of assumption of risk did not apply.

ASSIGNMENT OF ERROR NO. 3.

That the said Court erred in holding that the Federal employers' liability Act of 1908 has no application in this case in so far as the doctrine of assumption of risk is concerned and that said doctrine as applied by the State courts, governs.

ARGUMENT

STATEMENT OF FACTS

As we shall set out at some length, the evidence bearing on the plaintiff's assumption of risk, and the defendant's alleged negligence in regard to the construction, maintenance and operation of the cinder pit, in connection with our argument on the second and first assignments of error, respectively, we deem it sufficient at this time to limit the Court's attention to those facts which describe the scene of the accident, and show how it happened.

In the latter part of December, 1912 (Record, p. 151), or about January 1, 1913 (Record, p. 25), the defendant put into operation in its railroad yard at Cumberland a modern and up-to-date cinder pit two hundred feet long and fifty-eight feet wide. This pit consists of two large concrete tanks with a track passing over the outer edge of each one. These two tracks are called fire tracks, and are the ones on which engines come to have cinders removed.

The bottom of the pit, or concrete tanks, along these tracks, is inclined at an angle of forty-five degrees, so that the cinders will slide down towards the middle of the pit (Record, p. 80). The depth of the pits under the tracks is three or four feet and about eight feet in the middle (Record, p. 83).

The pits are filled with water and the cinders are removed by means of buckets on a carrier operated by a traveling crane (Record, p. 80), and are loaded into cars which are placed on a track which runs parallel to the fire tracks and between the two pits or concrete tanks (Record, p. 53).

The whole pit is covered by a series of parallel steel trestles, which support the crane (Record, p. 53). These trestles are twenty or thirty feet high (Record, p. 37), and twelve or fourteen feet apart (Record, p. 120). Every third span is open and it is at this place that the engines stop so that the fire-boxes and ash-pans may be cleaned (Record, p. 120) by means of rakes, etc., about eight feet long (Record, p. 124).

Between the other spans there are iron cross bars, or struts, but these are merely part of the design of the steel superstructure, and are only there for the purpose of strength (Record, p. 97).

The pit is lighted by four one thousand candle power

arc lights about forty feet high directly over it (Record, p. 87 and 121), and by four two hundred candle power electric lights on the operator's box which is hung below the traveling crane over the center of the pit (Record, p. 121 and 37).

South of the cinder pit, which is the side from which the plaintiff fell in, are two "ready tracks," the first of which is about seventy-five feet from the pit (Record, p. 13), that is, tracks on which engines are prepared for their runs; there is a track on the southern edge of the pit but it passes over a small portion of the pit, and is properly a portion of the pit's lay-out (Record, p. 81). The northern of these two "ready tracks" is about seventy-five feet south of the cinder pit (Record, p. 13).

With the exception of these two "ready tracks," there is no entrance, or other part of the railroad yard, or building, or additional tracks south of the cinder pit (Record, p. 156).

The main part of the yard is towards the north, and the pit is protected on that side by an embankment six or eight feet high on which is built what is known as "the hump track" or storage track for the coaling tipple (Record, pp. 156 and 80).

Whitacre was an experienced railroad brakeman, and had run out of the Cumberland yard since August, 1909 (Record, p. 11). He was front or head brakeman and his duties required him to report to his engine, along with the engineer and fireman, on the "ready track" and proceed with it to get the train at Evitts Creek which is about one-fourth of a mile away (Record, pp. 116, 142, 143).

He was called at 1 a. m. on June 23, 1913, and reported within an hour at the caller's office in the railroad yard. It had been raining earlier in the night and at the time it

was foggy, and he carried a lantern. His engine was on the northern of the two "ready tracks," near and south of the cinder pit, and *he walked to it from the caller's office by following the various tracks because he "knew from the switches" which tracks to take.* In going to his engine he passed the west end of the cinder pit.

Whitacre saw no one on the engine except the fireman, who told him that the tool boy had not left a tin cup and asked him to hunt the tool boy and get a cup. In compliance with this request he started out to find the tool boy, and after going a short distance he saw a moving light and thought it might be the boy just leaving the engine.

Q. Were you in a hurry?

A. Yes, sir.

Q. To overtake the boy?

A. Yes, sir.

Q. Were you running or walking?

A. I was walking as fast as I could in the fog (Record, p. 36).

"I followed the light and think I walked about twenty-five steps. The light was going due west and cut right across north and disappeared behind something, which was an engine. I could tell by holding my lantern up that it was an engine, and in order to avoid danger, *I walked back* several steps east, and fell into this cinder pit."

(Record, pp. 12-13).

It is admitted that the plaintiff was engaged in interstate commerce at the time of the accident.

ASSIGNMENT OF ERROR NO. 3.

THE COURT OF APPEALS OF MARYLAND ERRED IN HOLDING THAT THE FEDERAL EMPLOYERS' LIABILITY ACT HAS NO APPLICATION IN THIS CASE IN SO FAR AS THE DOCTRINE OF ASSUMPTION OF RISK IS CONCERNED AND THAT SAID DOCTRINE AS APPLIED BY STATE COURTS GOVERNS.

Judge Stockbridge, who delivered the opinion of the Court of Appeals, held that as the breach of no Federal statute enacted for the safety of railway, etc., employes is involved in this case, as provided in Section 4 of the Act, the whole question of assumption of risk is to be determined by State judicial decisions as distinguished from Federal decisions. In other words, his theory is that the defense of assumption of risk is, by the provisions of Section 4 of the Act, under the facts of this case, still available to the defendant as fully as though the Act had not been passed, and, this being so, such defense is not to be determined by Federal authority but by State authority. The exact language used is as follows:

> "Upon this branch of the case the Act of Congress has no application, because Sec. 4 by its terms applies only in a certain class of cases, of which this is not one, and if we take the rules as applied in the State Courts, the risks which are assumed by an employee are those incident to, or connected with, the work which the employee performs, not those which may exist in other portions of the establishment or yard where he himself has no duties and where he has a right to rely upon the master's having performed his entire duty."
> (Record, p. 172).

This can only mean that *in every case,* what amounts to assumption of risk is always a matter to be determined

by the various State Courts, because if in one case there is a violation of the Federal statute enacted for the safety of railway, etc., employés the provisions of Section 4 of the act abolish entirely the defense of assumption of risk, and there is no inquiry into it whatsoever, and if in another case, such as in the present one, there is no violation of such a statute and consequently there does remain the defense of assumption of risk, the validity of such defense, or what amounts to assumption of risk, must, according to Judge Stockbridge, be decided by the State Courts.

That is to say, whether a plaintiff's right of recovery under this *Federal statute* is defeated by the doctrine of assumption of risk, depends exclusively on how *State Courts* apply such doctrine to the facts of the particular case. In some states this doctrine is but a shadow of its robust common law ancestor, while in others it flourishes with its pristine vigor. So that, if Judge Stockbridge's theory is sound, while there would be one definite Federal employer's liability act, there would be as many interpretations of the right to recover under it, in connection with the doctrine of assumption of risk, as there are states in the Union.

The opinion of the Maryland Court of Appeals does not refer to any particular state authority as its guide in not applying the doctrine of assumption of risk to the facts of this case, so that we are unable to say which of the forty-eight varieties was followed, but our earnest contention is that Congress having seen fit to legislate on this subject it is "hands off" for all State Courts, except in the mere matter of procedure.

There is ample authority for this position, Mr. Roberts in his work on Injuries to Interstate Employés on Railroads, p. 3, says:—

> "From this babel of judicial voices, (inconsistent State decisions) with its consequent glaring inequities and inequalities, came the national act declaring one rule of liability throughout the nation and with it, as a necessary concomitant, the decisions of the national courts, construing the act in all its parts became binding upon all state courts."
>
> "In construing the Federal employers liability act, the decisions of the national courts control over those of the state courts. For example, in determining when a carrier is guilty of negligence under the act; when an employe assumes the risk; . . . are all matters upon which the decisions of the national courts control" (id. Sect. 8, p. 15).
>
> "Decisions of state courts and laws of the several states do not govern in determining the application of the doctrine of assumption of risk in actions under the Federal act. On the contrary this defense is to be applied as construed and defined by the decisions of the national courts" (id. Sect. 98, p. 193).

In *Seaboard Air Line* v. *Horton,* 233 U. S. 492, 506, 507, the court said:

> "It will be observed that by this instruction the application of the rule of assumption of risk was conditional upon the jury finding that the water gauge, when furnished to plaintiff, was in a safe condition. Here again the court appears to have followed the local statute, rather than the Act of Congress. . . .
>
> "The trial court, while recognizing that the Act of Congress applied so far as its terms extended, and that by its terms the employé is not to be held to have assumed the risk in any case where the violation by the carrier of a statute enacted for the safety of employés contributed to the injury,

at the same time held that, since no statute had been enacted covering such an appliance as the glass water gauge, the rights of plaintiff were such as he would have under the state law."

In *Central Vermont Ry.* v. *White*, 238 U. S. 507, 512:

"Congress in passing the Federal employers' liability act evidently intended that the Federal statute should be construed in the light of these and other decisions of the Federal courts. Such construction of the statute was, in effect, approved in *Seaboard Air Line* v. *Moore*, 228 U. S. 434. There was, therefore, no error in failing to enforce what the defendant calls the Vermont rule of procedure as to the burden of proof."

We do not see, therefore, how it can be successfully argued that in an action under the Federal employer's liability act the application of the doctrine of assumption of risk is to be determined by the decisions of State courts.

ASSSIGNMENT OF ERROR NO. 1

THE COURT OF APPEALS OF MARYLAND ERRED IN HOLDING THAT, UNDER THE FACTS OF THIS CASE, THE DEFENDANT WAS NEGLIGENT UNDER THE PROVISIONS OF THE FEDERAL EMPLOYERS' LIABILITY ACT.

This question is a most vital one as unless the defendant can be held to have been guilty of negligence the plaintiff is not entitled to recover. At common law a railroad company does not guarantee the safety of its employés and this principle has not been changed by the provisions of this act.

"It was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employés for de-

fects and insufficiencies not attributable to negligence."

Seaboard Air Line *v.* Horton, 233 U. S. at 501.

"To hold that under the statute the railroad company is liable for the injury or death of an employé resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence' " (id. at 502).

The allegations of negligence contained in the declaration are negligence in failing to provide a tin drinking cup; negligence in maintaining the cinder pit, in that the pit was filled with water covered with floating ashes so that it could not be seen, and not protecting it by guard rails.

The plaintiff's theory of negligence, as set out in his first prayer, which is the only one dealing with the subject, is that the "cinder pit was negligently maintained then and there by the defendant, unlighted and without guards and in such condition that the water and ashes concealed said pit." (Record, p. 159.)

Judge Stockbridge, who delivered the opinion of the Court of Appeals of Maryland, in regard to the defendant's negligence, held as follows:

"There was a practical unanimity of evidence that the pit itself was admirably constructed according to the best modern engineering ideas of what such a pit should be, but the negligence claimed was of two descriptions: one, the insufficient lighting of the pit, in regard to which there was a conflict of evidence whether the electric lights which had been placed there were or were not burning at the time of the happening of the accident, so as to give a good illumination of the

pit; and, second, that the pit was a dangerous appliance for the purposes for which it was designed and used, by reason of the absence of guard rails. Upon this phase also there was a conflict of evidence, that of the plaintiff in support of the dangerous character of the appliance, being the testimony of certain engineers in the nature of what is commonly spoken of as expert testimony."
(Record, pp. 170-171).

As the evidence does not establish the allegations, and as there was no instruction on the subject we do not feel called upon to take any further notice of the alleged negligence in regard to the failure to supply the tin drinking cup, and will confine the discussion to these propositions; first, the cinder pit is a proper and safe appliance as regards construction, lights, location and operation, etc., and there is no negligence to be inferred from absence of guard rails, and second, there is no legally sufficient evidence to show that the lights around the cinder pit were not burning at the time of the accident.

The cinder pit is a proper and safe appliance as regards construction, lights, location and operation, etc., and there is no negligence to be inferred from absence of guard rails.

The testimony on this question is as follows:

JAMES P. GAFFNEY,
(Plaintiff's Witness, Civil Engineer)
Direct Examination.

Q. Will you state whether the cinder pit as constructed and maintained by the Baltimore and Ohio Railroad is or is not safely constructed and maintained?

A. I consider it very unsafe.

Q. In what respect?

A. In as much as persons crossing the track might walk into it inadvertently not knowing where he was going (Record, p. 53).

* * * * * *

Q. Will you state to the jury in what way that cinder pit could have been made reasonably safe?

A. There are several ways in which it could have been made safe. By having gates there or bars along continuous as you saw in the struts to prevent any persons walking across the track from falling into that pit—a three-by-four bar or a two-by-six bar dropped down that would prevent a person from walking across, or they might have signs put there—danger signs—just as any danger sign might avoid any person inadvertently from walking in.

(Record, pp. 54-55).

Cross Examination

Witness has only built one cinder pit.

(*Record*, p. 56.)

* * * * * *

Q. Did you have guard rails at that pit?

A. No, sir.

Q. Any danger signs?

A. No, sir.

Q. Did you put up rails of any kind to prevent people from falling into it?

A. Yes, sir. The wheel track came along and ran right by that to the machine shop. No person could have passed through there.

Q. You put no barriers up?

A. No, sir.

Q. No signs?

A. No, sir. It was trifling this ash pit that I spoke about along in comparison with the one there. We had only ten engines to take care of

there—with thousands here. They were emptied in the evening.

(Record, p. 57).

* * * * * *

Q. You state that Saturday when the snow was there the appearance of the pits were darker?

A. Yes, sir.

Q. The last time you gave testimony the ashes were a lighter color, a gray?

A. Yes, sir. A gray because the rest was mixed with coal dust.

Q. You could distinguish the difference very easily by the color?

A. Yes, sir, by the color.

Q. You said the reason for putting guard rails or obstructions up there was to keep those who would walk into the pit from walking into there inadvertently?

A. Yes, sir.

Q. If a man was looking where he was going and was watching he would not fall into there?

A. No, sir. I think not.

Q. Please state whether in your opinion as an engineer if this is a modern and up-to-date cinder pit.

A. Yes, sir, the best I ever saw.

* * * * * *

Q. Have you ever seen any cinder pits guarded as you have indicated?

A. No, sir. Except in the Georges Creek Railroad pit there were obstructions to keep people from falling in.

Q. Did you not say that the difference in the George's Creek Railroad pit and the Baltimore and Ohio Railroad pit is so great that it would not require any protection?

A. No, sir; not just that. I said it was so close around the turn table that it did not need protection.

Q. The round house and yard of the Georges Creek Railroad was very much smaller?

A. Yes, sir.

Q. You said there was no necessity for guard rails at the Georges Creek pit at all?

A. But with understanding that there were some wheels around there.

* * * * * *

A. Yes, sir. A track with car wheels on it.

Q. They were not put there to act as a barrier?

A. No, sir.

(Record, pp. 59-60).

J. B. FERGUSON

(Plaintiff's Witness, Civil Engineer)

Direct Examination.

Q. Assuming the testimony which you have heard to be true, state whether or not in your opinion the ash pit is reasonably safely constructed and maintained in reference to members of crews who go there in that neighborhood in the discharge of their duties? * * * Can you say whether it is or not?

A. I would say it is not.

(Record, pp. 62-63).

Cross Examination.

Q. I believe you testified to something about this pit not being reasonably safe. In what respect is it not reasonably safe?

A. I think it is a little open in allowing men working in that neighborhood to cross tracks and fall into those pits.

Q. Do you understand that men working there as members of train crews would have to cross these pits?

A. I suppose it would be convenient at times.

Q. Do you mean to cross these pits?

A. Yes, sir. When there is blocking of trains.

Q. Then you mean that it might be convenient for men to go across these pits when there is blocking of trains?

A. Something like that; yes, sir.

Q. Do you know that no trains at all go up there?

A. I did not know about trains at all. I only heard the testimony.

Q. Do you know that only engines go up there?

A. No, sir. Trains may be stalled up there.

* * * * * *

Q. Did you understand that there was a train of cars up there at this cinder pit?

A. Yes, sir. There might be.

* * * * * *

Q. If only engines were there and the trains three-fourths of a mile away were made up would that modify your testimony?

A. I suppose that the place would be dangerous to men not familiar with the neighborhood and at times men would not know where they were, particularly on very dark nights.

Q. Suppose a man knew all about the neighborhood?

A. Place would be less dangerous, but they were not familiar.

Q. Suppose he had been there twenty times by day and six times by night and was very familiar with the location of the coal tipple, the engines on the ready tracks, and the ready tracks, do you still think that it would be dangerous to him?

A. It might be dangerous to him possibly depending upon conditions.

Q. What do you mean by that?

A. Well, if it was a very dark night.

Q. Would a light help him.

A. Yes, sir. I think it would.

Q. Suppose four arc lights were burning over his head, would that help him?

A. It would help him to locate the structure, I suppose.

(Record, pp. 65-66).

* * * * * *

Q. In your railroad experience in all the cinder pits you know of, have you ever known any to be protected by guard rails or barriers put there for that purpose?

A. No, sir. I have not.

Re-Direct Examination.

Q. Mr. Ferguson, in your capacity as an engineer, can you state whether there is any simple and reasonable inexpensive way to protect that pit at Cumberland, from danger to persons in the neighborhood of it?

A. I would agree with the suggestion made by Mr. Gaffney which is shown in every third panel could be reasonably placed in every panel or some sort of a rail to prevent a man from passing by the over head structure, or by a simple system of lights.

* * * * * *

Q. Lights stationed at this ash pit, where?

A. To guard the four approaches at each end and the side.

Q. Do you mean to put on a rail fifty feet high or down on a level with a man's eyes?

A. On the level with a man's eyes.

Re-Cross Examination

Q. In your experience did you ever see cinder pits protected that way?

A. No, sir. I have not.

Q. Do you know the way in which this cinder pit is protected?

A. As I heard Mr. Gaffney describe it.

Q. Did you hear Mr. Gaffney describe this portion there where the ashes are drawn out from the fire boxes and that men come along and push the ashes down into the deeper part of the pit?

A. Yes, sir.

Q. Do you know what kind of a rake or pole is use for that?

A. I do not know, but I suppose similar to the ones used on the engine.

Q. A long-handled rake?

A. Yes, sir.

Q. In doing that would not they interfere with the rod there?

A. The rod would have to be moved.

Q. But you agree to that?

A. Yes, sir.

Q. You never saw any fixed that way?

A. No, sir; never knew any to be fixed that way.

(Record, pp. 67-68).

W. P. STARR

(Defendant's Witness, Civil Engineer)

Q. Are you familiar with this cinder pit in the South Cumberland Yard?

A. I had charge of the construction of that pit, and think I know pretty nearly everything about it that you could ask.

(Record, p. 79).

* * * * * *

"The cinder pit consists of two large concrete tanks with a track passing over the outside edge of each one. The tanks are two hundred feet long from center to center or 198 feet from inside. These little square places are steel towers and hold the overhead crane. On the north and south sides of the cinder pit are the fire tracks.

Q. What do you mean by fire tracks?

A. The tracks on which the engines come to have the cinders removed. Along this track is the pit which is beveled to the bottom. It runs down on an incline of forty-five degrees so that cinders will naturally slide down into the pit so that they can be taken up by these buckets. Then they slide along a carrier, which places the cinders into the cars which are located on the center track. The pit is symmetrical and beveled on both sides and both north and south tracks of the pit are used for the same purpose.

* * * * * *

Q. What is the width?

A. The crane is 58 feet from rail to rail.

Q. You mean the overhead structure?

A. Yes, sir. The outside.

(Record, p. 80).

* * * * * *

Q. How many tracks south of the cinder pit entirely clear of the cinder pit?

A. Two tracks—one on the south and this one —then there is a third track which passes over a small portion that is really part of the cinder pit.

* * * * * *

Q. There are two ready tracks south of the cinder pit?

A. Yes, sir; two.

Q. Can you coal from either one of the two ready tracks?

A. Yes, sir; from the north one of the two ready tracks.

* * * * * *

Q. What is the distance between the east end of the cinder pit and the west end of the coal tipple?

A. One hundred and ten feet.

(Record, p. 81).

* * * * * *

Q. Do you know how the cinder pit was lighted?

A. There was a light between the two southernmost tracks of the cinder pit and west of it a distance of about thirty feet from the pit.

Q. What kind of light?

A. An arc light.

* * * * * *

Q. What was the height of it?

A. Thirty-five or forty feet approximately.

Q. Did you construct the lights?

A. No, sir; I simply located the place where they were to be.

Q. You simply picked out the location?

A. Yes, sir; the location. I know they are flaming arc lights.

Q. Were they located where you designed them to be located?

A. Yes, sir. There was another at the east end of the pit then overhead. There was another light on the north side of the pit about 70 feet west of the east end and was as close to the overhead structure as we could place it.

Q. Same kind of a light?

A. Yes, sir. And there was another light about one-third of the distance from the coaling station between the coal station and the east end of the pit of the same character.

Q. How far would that be from the east end of the cinder pit?

A. 170 feet approximately.

(Record, p. 82).

Q. How many lights in all were there over the cinder pit?

A. Four lights—four arc lights very close to it.

(Record, p. 83).

(Recalled)

Q. Will you state whether in design or construction that is a safe cinder pit?

A. That is a safe cinder pit; yes, sir.

Q. Will you please state whether in the arrangement—the lay out of the yard—taking into consideration the round house, the hump, the coal tipple, etc., this is a safe cinder pit?

A. It could not be safer.

Cross Examination.

Q. I understood you to say that this cinder pit could not be made safer?

A. Yes, sir.

Q. I understood you to mean by that that you could not put guard rails there?

A. Yes, sir; you could, but it would not be practicable.

Q. It would not be practicable to put scaffolding there and widen it and put guard rails there?

A. It could be widened, but it would be so wide that there would be no protection. The direction in which a person would be apt to walk into the pit would be still open.

Q. Could you not close the ends to the same extent that they are closed now?

A. The ends; yes, sir.

Q. If you would close the ends to the same extent that they are now and widen the steel work, there would not be much difficulty?

A. You could not put this railing across the tracks.

Q. What is the reason you could not widen the steel work and then put guards between the uprights and also place at the ends where you say there is danger guard rails so that there is no more space at the ends than there is now?

A. That would not be possible. That would be like running a fence along a station platform and leaving the gates open. The only persons who are supposed to go in that yard are persons who

are employed there. On the south side of the pit there is no entrance.

* * * * * *

Q. That is the best reason?

A. I have not finished. On the south side there is no entrance and there is no other part of the yard and no additional tracks except the two ready tracks and no buildings, while a person going from the north side of the yard where the main part of the yard is and would be apt to lose his bearings and would have to pass over an embankment about six feet or eight feet above the pit and go on into the cinder pit. There would be no guard rails needed.

(Record, pp. 155-156).

Barnette, B. & O. R. R. Co., Engineer, Member of Division Safety Committee (for Cumberland) whose duty it to inspect general conditions of yards, etc, from a "safety" standpoint, considers pit safe. Guard rails or barriers "would interfere with the working of it (pit) and would be a menace to the men working there and with the men getting on and off the engines." Pit could not be used for purpose for which it was designed.

"The one (cinder pit) at Sir Johns Run had a guard rail and the Safety Committee ordered it taken down" (Record, p. 86-7).

"The barriers would be in the way of the men cleaning the fire. They would strike their hands against it. It would also be in the way of men getting upon the engines. Also the hostlers" (Trout, General Foreman, Western Md. Ry. Co., Record, p. 90).

"They (guard rails) would interfere with the operation of the cinder pit and the men engaged in that service" (Alexander, General Road Foreman of Engines, Penna. R. R. Co., East Penna. Div., Record, p. 94).

"It is impractical (placing of guard rails). It is out of the question. Where you have the movement of engines over the ash pit every minute or two, it is impracticable. Impossible" (Hunter, Master Mechanic, Phila. & Reading R. R., Record, p. 99).

"The guard rails and barriers would have to be so far removed that they would not act as a guard" (Kline, Civil Engineer in charge of Cumberland Div., Western Md. Ry. Co., Record, p. 103).

"It (guard rail) would interfere with the workmen handling their fire rakes. They are on an average of eight to ten feet long. It would also interfere with the men getting on and off their engines" (Knight, Master Mechanic, Western Md. Ry. Co., W. Va. Div., Record, p. 108).

"It (guard rail) would be a menace—because they could not clean their ash pans. It would be so far away that it would not prevent any one from falling into there" (Nixon, Engineer, B. & O. R. R. Co., Record, p. 111).

"A menace (i.e. guard rail)—because a man getting down from the engine it (guard rail) would be liable to knock him under the engine. It would be in the way of cleaning out ash pans, etc., and I would not consider it necessary" (Hodges, General Foreman, B. & O. R. R. Co., Record, p. 114).

"A menace (guard rail). The men could not operate their tools to properly clean the engines. Ordinarily the hostlers must use an iron bar about eight feet long to open the ash pan slide by putting it under and prying the ash pan open" (Wilmoth, Road Foreman of Engines, B. & O. R. R. Co., Record, p. 124).

No other cinder pit has guard rails.

Gaffney (Plaintiff's witness)	Record, p. 60
Ferguson " "	" " 67
Barnette	" " 87
Trout	" " 90
Alexander	" " 94
Hunter (has 20 pits in his territory)	Record, p. 99
Kline	" " 103
Knight	" " 107

All of these witnesses, and one or two in addition, agree that this pit is one of the best and most modern in the matter of lights, design, construction, location and operation.

We do not see how anybody can read this testimony and fail to agree with the Court of Appeals of Maryland in its statement that "there was a practical unanimity of evidence that the pit itself was admirably constructed according to the best modern engineering ideas of what such a pit should be."

It is not situated "in the central portion" of the railroad yard as alleged in the declaration (R., p. 8), or as found by the Court of Appeals, but is on the extreme south of the yard where there is no entrance, no other part of the yard, no buildings, and no tracks except the two "ready tracks" hereinbefore referred to. The main part of the yard is located north of the pit, and, on this side, the pit is protected by an embankment about six or eight feet high, on which is placed the "hump track" hereinbefore referred to (R., p. 156). Thus the uncontradicted evidence shows that the pit, as located with reference to the other parts of the yard, is in a safe and practically separate portion thereof.

The cinder pit is lighted by means of four one thousand candlepower arc lights placed around it, set 35 or 40 feet above the ground, and practically over it, and by four

incandescent 200 candle power electric lights placed on the bottom of the operator's box which is suspended from the traveling crane immediately over the pit. (R., pp. 87, 121.) The evidence shows that these lights not only served to illuminate the pit but also furnished light for all work done around that portion of the yard. For example, Dyche, fireman on the engine, and part of the same train crew as the plaintiff, testified that on the night of the accident he had no light in the cab of the engine as the arc lights around the pit furnished sufficient light (R., p. 134.) The lighting of the pit was described by Hunter, an impartial witness, who is Master Mechanic of the Philadelphia & Reading Railway Company, as follows: "It was the best lighted ash pit I have ever seen." (R., p. 99.)

It seems useless to dwell further on the general character of the cinder pit, as even the plaintiff's expert witness, Gaffney, describes it as "the best I ever saw." (R., p. 60).

The fact that this is a water pit can make no difference in this connection, for the chance of falling into a dry pit which has no guard rail is equal to the chance of falling into an unguarded water pit, and besides, dry pits are of the same general design as wet pits (Record, p. 114). It is not negligence *per se* to have a water cinder pit in a railroad yard, nor can negligence be inferred because some of the ashes thrown into the water rise to the top in accordance with an immutable physical law.

No idea of this kind is even suggested in the testimony, and the allegation in the declaration is that "said cinder pit being filled with water, and the top thereof being covered with ashes, so that the cinder pit was concealed in the darkness, and the plaintiff could not see the pit and avoid the dangerous place" (Record, p. 8). This, how-

ever, is not a charge of negligence, or a statement that the pit is unsuitable or unfit for the purposes for which it was built, but is rather in the nature of an excuse to explain why it was that the plaintiff fell in. Whatever force there may be in it depends on how much Whitacre knew, or must be presumed to know, of the situation, all of which is pertinent to the question of assumption of risk, but it has no bearing on the subject of the negligence *vel non* in connection with the pit as a pit.

We have already set out at some length the testimony showing that this cinder pit is an admirable one, or, as one witness expresses it, " there is no point about there (the pit) but where the latest devices were used and the latest methods of construction were used" (Record, p. 103), while another says: "I have recommended that we (Philadelphia & Reading Ry. Co.) build ash pits of the same kind if we do build any" (Record, p. 99).

The absence of the guard rail, therefore, seems to present the only possible question of negligence that can be raised in this connection. The only testimony tending to show negligence in this particular is found in that of the two expert plaintiff witnesses, Gaffney and Ferguson.

> Ferguson: Q. I believe you testified to something about this pit not being reasonably safe. In what respect is it not reasonably safe?
>
> A. I think it is a little open in allowing men working in that neighborhood to cross tracks and fall into those pits.
>
> Q. Do you understand that men working there as members of train crews would have to cross these pits?
>
> A. I suppose it would be convenient at times.
>
> Q. Do you mean to cross these pits?
>
> A. Yes, sir. When there is blocking of trains.
>
> Q. Then you mean that it might be conven-

ient for men to go across these pits when there is blocking of trains?

A. Something like that; yes, sir.

Q. Do you know that no trains at all go up there?

A. I do not know about trains at all. I only heard the testimony.

Q. Do you know that only engines go up there?

A. No, sir. Trains may be stalled up there.

Q. Did you hear the testimony?

A. Yes, sir.

Q. Did you hear that the trains were made up at Evitts Creek, and the engine was taken down by the fireman, brakeman and engineer about three-fourths of a mile below where the train is?

A. Yes, sir.

(Record, p. 65).

In other words the idea of this witness seems to be that it is often necessary for men to cross this cinder pit on account of the trains becoming blocked. He seems to think that the cinder pit is in the middle of the yard and that trains are made up around it, and that there is a great deal of passing to and fro, and even crossing of the pit by men engaged in the yard. As a matter of fact he never saw the cinder pit in question. (Record, p. 62.)

This is an entire misapprehension of the evidence, which is that the pit is located at the extreme south of the yard and that there are only two tracks south of it, the nearest being about seventy-five feet distant, which are known as "ready tracks" and are the tracks on which engines are prepared for their runs, and over which tracks they are taken by the engineer, fireman and front brakeman to the train proper, which is at Evitts Creek, a distance of about one-fourth of a mile from the cinder pit.

The other witness, Gaffney, seems to have much the

same impression, because his reason for stating that the cinder pit is unsafe is "inasmuch as persons crossing the track might walk into it inadvertently not knowing where he was going." (R., p. 53.)

We do not for a moment concede that even if the pit was located as imagined by both of these witnesses, or used as a thoroughfare, as described by them, it would be negligence on the part of the railroad company not to surround it with a guard rail, but we do most earnestly contend, and our position is fortified by the uncontradicted evidence, that the situation with which we have to deal is not the situation to which these witnesses testified.

It must be remembered that the suggestion of these experts as to the guard rail is the only evidence there is in the case from which it is even possible to infer negligence, in this connection, on the part of the defendant. Their suggestion is that the pit, as at present constructed, is unsafe because there is not a continuous barrier or guard rail along is sides.

The parallel steel trestles which cover the pit and support the travelling crane are spaced apart in spans of 12 to 18 feet. (R., pp. 120, 54.) Every third span is open and it is at these points that the engines are brought to have their fire boxes and ash pans cleaned. (R., p. 120.) The other spans are connected by means of struts which are not put there for protection but solely for strength and as part of the design. (R., p. 97.)

The idea of these two witnesses is that these open spans should be protected by a guard rail. Neither of them testified as to the practicability of this scheme, but one, Ferguson, frankly admits that when an engine was being cleaned the guard rail would have to be removed as it would interfere with the long rakes, etc., that are used for drawing the fire (R., p. 68).

Both positively state that they have never seen or even

heard of any cinder pit, of whatever kind or description, that is protected by guard rails or barriers, and all the defendant's witnesses, whose evidence is along this line, testified to the same effect In other words, on both sides, the testimony is in accord that there is no such thing as a cinder pit wet or dry, which is protected by guard rails. The reason for this is apparent when the evidence is read. Nine witnesses of the defendant, all practical railroad men, representing in addition to this defendant, the Pennsylvania Railroad Company, the Western Maryland Railway Company and the Philadelphia & Reading Railway Company, all testified that the pit could not be used for the purposes for which it was intended if it had a guard rail, and, moreover, the existence of a guard rail would be a menace to the trainmen.

It is true that plaintiff's two experts advocated the use of a removable guard rail, but, under the facts of this case, such a rail would be absolutely useless for the prevention of an accident such as before the plaintiff, because the indisputed evidence is that the fire tracks are continuously used throughout the day and night.

> "As fast as that engine goes away another engine would come in and the rail would be down all the time" (Record, p. 96).
>
> "I do not recall of ever seeing them (fire tracks) vacant. I never saw the fire track vacant" (Record, p. 116).

The situation as to this guard rail, it seems to us, is that the witnesses on both sides agree that they do not know of a single pit in the country that has a guard rail, and not less than ten responsible, practical and experienced railroad men from four large railroads, one of which is the defendant, testify in positive terms, and give

their reasons based on actual experience, that the use of a guard rail is not only impractical but unsafe.

Against this we have the statements of two experts, neither one of whom is at present, or has been for some time past, engaged in railroad work, that this cinder pit is unsafe because it has no guard rails, and that it would be safer if it was surrounded by a guard rail. We do not think that it takes an expert to say that there would be less chance of falling in a pit if it had a high fence around it than if it had not. The question, however, with which we are concerned is whether this testimony, or any inference which can be properly drawn from it, imputes negligence to the defendant.

In considering this testimony it must be remembered that both of these gentlemen imagine the cinder pit to be in a very different location than what it really is, and that the only one who testified as to the practical effect of a guard rail in relation to the uses for which the pit was constructed, admits that whenever engines were cleaned the section of the guard rail which he advocates, that is, between every third span of the uprights that support the traveling crane, would have to be removed. The uncontradicted evidence is that these open spans are in constant use by engines both during the day and during the night, *and moreover the plaintiff walked along the side of an engine at the pit just before the accident, so that even a guard rail would not have prevented the accident.* Record, p. 38).

Judge Stockbridge, of the Maryland Court of Appeals, held that the testimony of these two experts was sufficient to take the case to the jury on the question of negligence. We submit that this evidence amounts to nothing more than a platitudinous statement that the pit as constructed is unsafe or dangerous, as regards the possibil-

ity of any one falling into it, because it would be safer and not so dangerous if it were entirely surrounded by a guard rail. The question before us, however, is not whether the existence of a guard rail would make this cinder pit less dangerous, in that the opportunity to fall into it would be diminished, but has the railroad company been guilty of negligence towards this brakeman, Whitacre, because it maintained in its yard at Cumberland one of the most modern and improved cinder pits in the country, but one that is not protected by guard rails?

Or, to state the proposition in its simplest form, has the railroad company as to the guard rail exercised the ordinary or reasonable care which ordinarily prudent persons, engaged in the same kind of business, usually employ under similar circumstances.

In *Union Pacific Railway Company* v. *Daniels*, 152 U. S. 684, 690, 691, this Court approved an instruction, stating that;

> "'This duty (master's duty to servant) was discharged by the defendant if the care disclosed by it in these several matters accorded with that reasonable skill and prudence and care which careful, prudent men, engaged in the same kind of business, ordinarily exercise.'"

In *Washington etc. Railroad Company* v. *McDade*, 135 U. S. 554, 569, where the question was what degree of care it was the duty of a railroad company to exercise in furnishing machinery to its employés, this Court declared that the charge that the railroad company "had a right to use and employ such as the experience of trade and manufacture sanctioned as reasonably safe" was a proper one, saying:

> "We do not think there was an error in any of these instructions of which the defendant has any

> right to complain. The propositions contained in them are in strict accord with the principles laid down by the decisions of this court."

In *Southern Pac. Co.* v. *Gloyd*, 138 Fed. 388, 391, which was an action for personal injuries sustained by a brakeman due to his stepping into an open culvert, the court said:

> "The law requires that a master shall use ordinary care to provide for his servants a safe place in which to do their work. Ordinary care, as before stated, is that degree of care which prudent, intelligent, and experienced men usually employ under like circumstances to guard against dangers which are obvious or reasonably to be anticipated. This rule is plain, reasonable, and easily understood; and whether or not a master has in a particular case used ordinary care is readily determined by proof of the care which is usually employed by other prudent, intelligent men, engaged in like business under like circumstances, and in view of like hazards."

In *Chicago G. W. Ry.* v. *Minneapolis, St. P. & S. M. Ry. Co.*, 176 Fed. 237, at 240, a collision occurred on a single track used by both roads. An action was brought to determine which of the two roads was responsible for the accident, and in the course of the trial the "Soo" Company wanted to prove that on the day of the accident it had handled its train on this single track in the same way that the Great Western Company had handled trains on the same track before the accident. The Circuit Court of Appeals for the Eighth Circuit held that the evidence was proper, and said:

> "Where the nature of the act or omission is doubtful, the best test of actionable negligence,

> where available, is the degree of care which persons of ordinary intelligence and prudence commonly exercise under the same or like circumstances. If the care exercised in such a case rises to or above that standard, there is no such negligence, if it falls below it there is. The legal presumption was that the servants of the Great Western Company who had been operating its passenger trains upon the tracks leading out of St. Paul which were used by the 'Soo' Company on the day of the accident were men of ordinary intelligence and prudence, and hence the fact that it had been their uniform practice to handle their trains under like circumstances in the same way that the 'Soo' Company operated this train on that occasion was both competent and material evidence that it conducted it with reasonable care."

In *Lake* v. *Shenango Furnace Co.*, 160 Fed. 887, 895, the Court said:

> "The true test of actionable negligence is the degree of care which persons of ordinary intelligence and prudence commonly exercise under the same circumstances. If in a given case the care exercised rises to or above that standard, there is no actionable negligence; if it falls below it there is. Hence, in an action for damages for negligence, evidence of the ordinary practice and of the uniform custom, if any, of such persons in the performance under similar circumstances of acts like those which are alleged to have been negligently done is generally competent evidence, for it presents to the jury the correct standard for their determination of the issue whether or not the defendant was guilty as charged."

There is no need to multiply authorities, for the proposition is an elementary one. In every case where an act of contributory negligence is attempted to be fastened

on a plaintiff, the one and only test applied is the ordinary degree of care and caution that would be exercised by an ordinarily careful and prudent man under similar circumstances. It would seem but logical that this same test must determine the question of defendant's negligence.

The uncontradicted evidence shows that cinder pits, of whatever description, including water (Record, p. 103), and located on railroads other than that of the defendant, do not have guard rails—it is not the nature of the beast. The reason for this is, first, because it is not safe to the hostlers who clean the ash pans, etc., and second, because it is not a practical proposition.

Notwithstanding this universal custom of operating pits without guard rails, and in the total absence of proof of one pit in the whole country that is thus protected, the defendant has been held guilty of negligence, not because it failed to use the accepted methods of other supposedly careful and prudent railroads, but because it did follow these methods and did not originate a unique cinder pit.

This is not a case where the absence of guard rails is in iteslf so clearly negligent, that the non-user of such rails by other railroad companies under similar circumstances becomes immaterial or insufficient to modify its effect. The doctrine of *res ipsa loquitur* has no application to the present facts. The defendant has done, or omitted to do, nothing that speaks negligence, and there is no suggestion to the contrary to be found in the record, not even excepting the profound statement of the two experts that it is more possible to fall into an open pit than into one that has a fence around it.

There is no legally sufficient evidence to show that the lights around the cinder pit were not burning at the time of the accident.

The plaintiff does state that no lights were burning on the night of the accident (Record, p. 21), and this bare statement constitutes the entire evidence in the case. We submit, however, that an examination of the Record will show that there is uncontradicted testimony which deprives this statement of any probative value, and brands it as utterly unworthy of belief, so that no court would be justified in submitting a case to a jury on it, standing, as it does, alone.

We recognize the elementary principle that it is the exclusive province of a jury to pass on a disputed question of fact, but we also know that no court will send a case to a jury on a question of negligence where the evidence is so slight, inclusive and unworthy of belief, that it would not support a verdict even though the jury should find one. We do not feel called upon to cite authority for this fundamental principle.

Turning now to the evidence.—In the first place, four witnesses flatly contradicted the plaintiff, and in the second place, each witness establishes the fact that the lights were burning by uncontradicted evidence. It must be borne in mind, and it is conceded by everyone, that the night of the accident was dark and foggy, and that it was very difficult to see without artificial light. It must also be remembered that the lights in question not only illuminate the cinder pit, but all the adjacent portion of the yard (Record, p. 128 and 157).

Riley, who operates the coal dock, which is in the immediate vicinity of the cinder pit, testified that he worked from 6 p. m. to 6 a. m., and that if the lights had not been burning "it would not have been possible to operate

the coal tipple," and that the cinder pit and coal tipple are lit by the same lights (Record, p. 157).

Spearman, the foreman of the hostlers, who are the men that actually clean the engine fire boxes and ash pans on the fire tracks over the cinder pit, testified that he worked all the night that the accident happened, and that "the lights were on full" (Record, p. 151-153).

Dyche, fireman on the engine at time of the accident, testified that he walked through the yard to his engine on the "ready track" a short time before the plaintiff was injured, without a lantern and that he had no difficulty about seeing as there was plenty of light from the arc lights. He further said that while he was in the engine cab he lighted no light, as there was enough light for him to do his work from the arc lights (Record, pp. 131-137).

Albright, engineer of Dyche and plaintiff, not only testified that the lights were burning, but also that he walked to the engine on the "ready track," without a lantern, by the light of the arc lights (Record, p. 125-128).

In other words, the coal tipple was operated, engines had their ash pans cleaned, and people could walk about the yard without lanterns, and work was done in an engine cab on a night that was so dark, because there were no lights burning, that the plaintiff, speaking of his lantern, says, "it kept me from falling over anything large. Any large obstruction" (Record, p. 29). It, however, did not give enough light for him to see a dry tank (Record, p. 29), the steel trestles, 20-30 feet high, which cover the cinder pit (Record, p. 37), or that an object was an engine until he held his lantern up (Record, p. 13).

Therefore, the identical lights which the plaintiff says were not burning, by uncontradicted evidence, furnished sufficient light for the usual activities of the yard. It

would seem to us that Whitacre's bare statement is very far from being sufficient to take the case to the jury.

The Court's attention is directed to the fact that the absence of lights is not alleged in the declaration, and is only added to the plaintiff's instruction by the trial Court (Record, p. 159).

As the defendant has not been guilty of negligence on account of the absence of the guard rail, or in connection with the lights, or in having a water pit on which ashes float, or in the location, construction, design, and operation of the cinder pit, the plaintiff is not entitled to recover and the defendant's first or third instructions, withdrawing the case from the jury, should have been granted.

ASSIGNMENT OF ERROR NO. 2.

THE COURT OF APPEALS OF MARYLAND ERRED IN HOLDING THAT ON THE FACTS OF THIS CASE THE DOCTRINE OF ASSUMPTION OF RISK DID NOT APPLY.

Although this action is brought under the provisions of the Federal Employers' Liability Act, the plaintiff is not entitled to recover, if it should be held that he assumed the risk of falling into the cinder pit in question. This is so because the Act does not abolish the defense of assumption of risk except in those cases, of which this is not one, in which the alleged negligence involves a breach of a federal statute enacted for the safety of common carrier employés. As this point is settled we should not discuss it.

Southern Railway Co. *v.* Crockett, 234 U. S., 725, 730.

Seaboard Air Line *v.* Horton, 233 U. S., 492, 503.

The doctrine of assumption of risk as it existed at common law is a very definite and simple proposition and not one open for argument. An admirable statement of this doctrine, as applied by this court, is given by Mr. Justice Pitney in *Gila Valley Ry. Co.* v. *Hall*, 332 U. S., 94, 101, 102:

> "An employe assumes the risk of dangers normally incident to the occupation which he involuntarily engages, so far as these are not attributable to the employer's negligence. But the employe has a right to assume that his employer has exercised proper care with respect to providing a safe place of work, and suitable and safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employe becomes aware of such defect or unless it is so plainly observable that he may be presumed to have known of it. Moreover, in order to charge an employe with the assumption of a risk attributable to a defect due to the employer's negligence, it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it."

See also:

Felton *v.* Girardy, 104 Fed., 127 (Opinion by Mr. Justice Lurton).

Choctaw Oklahoma, etc. R. R. Co. *v.* McDade, 191 U. S., 64.

Chicago, B. & Q. R. R. *v.* Shalstrom, 195 Fed., 725.

Our contention is that Whitacre assumed the risk of falling into this cinder pit, as it was one of the "dangers normally incident to the occupation in which he voluntarily" engaged.

We have argued the proposition that the defendant, as the plaintiff's employer, has not been guilty of negligence and we submit that this contention has been established. However this may be, the distinction which exists between those ordinary risks which are assumed by an employé as incident to his employment and those extraordinary risks which are not assumed, unless known and appreciated by such employé, is not a matter of great importance in this case because the evidence shows that Whitacre actually knew and appreciated, or must be presumed to have known and appreciated, the risk of falling into the cinder pit.

It is important to bear in mind the distinction between the doctrine of contributory negligence and that of assumption of risk, because the former is no defense to a suit under the act, while the latter, under the facts of this case is a perfect one.

Seaboard Air Line *v.* Horton, 233 U. S., 492, 503-4.

> "The distinction (between contributory negligence and assumption of risk), although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employe, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employes in similar circumstances would use. On the other hand, the as-

sumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employe. The risk may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court."

Schlemmer *v.* Buffalo &c. Ry. Co., 220 U. S., 590, 596.

"Assumption of risk sometimes shades into negligence as commonly understood, there is, nevertheless, a practical and clear distinction beteen the two. In the absence of statute taking away the defense, or such obvious dangers that no ordinarily prudent person would incur them, an employe is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employe may be presumed to know of

> them, and if he continues in the master's employ without objection, he takes upon himself the risk of injury from such defects.
>
> "Contributory negligence, on the other hand, is the omission of the employe to use those precautions for his own safety which ordinary prudence requires."

In *Narramore* v. *Cleveland, C., C., & St. L. Ry. Co.*, 96 Fed. 298, Judge Taft in delivering the opinion of the Circuit Court of Appeals for the Sixth Circuit, on page 304, said:

> "That, under certain circumstances, the one (assumption of risk) sometimes comes very near the other (contributory negligence) and cannot easily be distinguished from the other, may be conceded; but in most cases there is a broad line of distinction, and it is so in this case. For years employes worked in railroad yards in which blocks were not used, and yet no one would charge them with negligence in so doing. The switches and rails were mere perils of the employment. Assumption of risk is in such cases the acquiescence of an ordinarily prudent man in a known danger, the risk of which he assumes by contract. Contributory negligence in such cases is that action or nonaction in disregard of personal safety by one who treating the known danger as a condition, acts with respect to it without due care of its consequences."

See also:

> Seaboard Air Line *v.* Horton, 239 U. S., 595, 601.
>
> St. Louis Cordage Co. *v.* Miller, 126 Fed., 495.

Bearing in mind the distinction between contributory negligence and assumption of risk, we maintain that the

act of the plaintiff, which resulted in his falling into the pit on the night in question, is not one which can be properly characterized as contributory negligence.

The plaintiff fell into the ash pit, according to his own statement, while proceeding from his engine, carrying a lighted lantern, about the middle of the night in question, in search of a tool boy for the purpose of getting a tin drinking cup. The night was dark and somewhat foggy, and according to the plaintiff, there were no lights burning. We have already dealt with the question of these lights in another part of the argument, and while we do not think there is evidence legally sufficient to show that they were not burning, we are perfectly willing to take the plaintiff's statement as true, for the purpose of this argument.

How can it be said from this evidence that the plaintiff's conduct at this time was so negligent, and that the danger of falling into the cinder pit was so imminent, that no person of ordinary care and prudence would have incurred it by walking away from the engine to look for the tool boy, as the plaintiff did.

There is abundant testimony that many other people were walking about the yard on this same night,—for example:

The tool boy had been to the engine but had left no drinking cup, which was the reason that the plaintiff went in search of it (R., p. 12).

The fireman, without a lantern, not only walked to the engine but drew water from a hose which was actually in between the iron supports of the traveling crane over the cinder pit (R., pp. 132-133).

The engineer, who also had no lantern, walked to the engine and in so doing passed very close to the cinder pit (R., p. 126).

Ambrose, a brakeman and extra conductor, walked to

the yard office and other places around the yard (R., p. 142).

Spearman, foreman of hostlers who clean engines on fire tracks immediately over the cinder pit, worked all of the night of the accident, and consequently must have walked immediately around the pit (R., p. 153).

In addition to these, other witnesses testified that they were on duty and working in this yard on the night of the accident.

Unless it be inferred that all of these winesses who were moving about the yard at the time plaintiff was injured were not persons of ordinary care and prudence, which, of course, is absurd, it would not seem to require much argument to show that what the plaintiff did, just before he was injured, can not be termed contributory negligence. Other employes were walking about the yard attending to their duties, just as the plaintiff was, and so far as the record shows, not one of them carried a light, except the plaintiff, the man who passed the pit just after the accident, and the undisclosed person whom the plaintiff was trying to overtake just prior to the accident.

No part of the plaintiff's conduct stands out as a glaring act of negligence, nor is the amount of care and caution exercised by him apparently any different from that of the other employes on duty that night, except that he was one of the few persons who carried a lantern. On this account it may be truly said that he exercised more care than the majority of the men in the yard. As a matter of fact, we do not see how the terms recklessness, want of ordinary care, disregard of imminent danger, or contributory negligence can be applied to the plaintiff's actions, and that the danger of falling into the pit was one with which he, himself, and all other employes, whose

work took them anywhere near the southern part of this railroad yard, constantly came in contact in the performance of their duties.

There are many authorities which decide that conduct infinitely more careless than that of the plaintiff, on the night of the accident, does not justify an application of the doctrine of contributory negligence to the particular case in question, but hold that the principle of assumption of risk is the controlling factor. Some of these cases are those last cited to show the fundamental difference that exists between contributory negligence and assumption of risk, others we shall cite in connection with our argument on assumption of risk. We ask the Court to refer to them in this connection.

It being apparent that the conduct of the plaintiff on the night of the accident can not be measured by the rule of contributory negligence, let us consider whether he assumed the risk of falling into the cinder pit.

We have already referred to the doctrine of assumption of risk, and cited what we consider an accurate statement of such doctrine from the opinion delivered by Mr. Justice Pitney in *Gila Valley Ry. Co.* v. *Hall, supra.* Therefore, it but remains to carefully examine the evidence for the purpose of ascertaining whether or not Whitacre knew and appreciated, or is presumed to have known and appreciated, the risk of falling in the cinder pit.

From *his own testimony* we find that:

He had been employed by the railroad company since 1886, and since August, 1909, or almost four years before the accident, had been a brakeman, and one end of 's run was in the railroad yard in question (R., pp. 10-11). This certainly gave him ample time to become acquainted with conditions in this yard.

He was an experienced railroad man, as is shown by the fact that he was front or head brakeman and extra flagman, which is a more responsible position than that of an ordinary brakeman, because it involves the protection of a train (R., p. 24).

He knew that the cinder pit was put into service January, 1913 (R., p. 25), or five months before the accident happened.

All his exact knowledge, and familiarity with the details of the cinder pit, the railroad yard, and the location of the various instrumentalities therein situated, was gained by him before the date of the accident. In three different places, in the record he states that he has not been to the cinder pit or in the railroad yard since he was injured (R., p. 25; R., p. 28; R., p. 33).

He knew that the pit has nine feet of water in it, and *that the ashes when they are dumped into it rise to the top of the water and look just like the ground, and that the ground around the pit is covered with cinders and looks like the pit, and that in a fog with a railroad lantern the pit cannot be told from the ground,* and that the engine at the time of the accident was twenty-six or twenty-seven steps from the pit (R., p. 13).

He knew the number of tracks over the cinder pit (R., p. 14).

He knew that his engine was standing almost opposite the coal pit, on the first track south of the pit. At the trial he identified photographs, pointed out various details, such as, where the water began in the cinder pit, where the concrete posts are placed that support the tracks over the water, where the fire track is; that the cinder pit is 150 feet long, where the ready tracks are, where the struts are between the uprights that support the traveling crane, and identified an iron structure as

the one on which the crane travels over the pit (R., pp. 20, 21, and 32).

He admitted that he had seen and been seen by the cinder pit about twenty times (R., pp. 25-30).

He knew where the hump track was and that it was raised above the ground and how many ready tracks are south of the pit and what they are used for (R., p. 26).

He boarded with a man that helped to build the pit, and says that he, himself, knows a great deal about it (R., p. 27).

That on the night of the accident on his way through the yard to the engine he passed a dry tank which he did not see but that *he knew* it was there; that he knew it much better than the cinder pit because it was in operation much longer. That he had only been using this way of going through the yard within the last six months; that the yard office is ten or twelve tracks away from this dry tank (R., p. 29).

He knew when he got to the round house because he knew its location (R., p. 30).

He knew from the switches what tracks he goes to, and walked down a particular track because it lead to the "ready track," which was south of the cinder pit (R., p. 34).

He knew that his engine was about opposite the coal tipple (R., p. 35).

He knew that he passed the west end of the cinder pit on his way to the engine (R., p. 36).

He knew that the trestles over the cinder pit, which support the traveling crane, are twenty or thirty feet high, and that there is an operator's box suspended below the crane, to which are attached four lights, and that these lights are on a different circuit from the arc lights (R., p. 37).

Some of the facts which show palintiff's knowledge of this cinder pit are:

That engines are continually, both in the day and in the night, running up and down on the fire tracks over the cinder pit, where they have their fire boxes and ash pans cleaned (R., pp. 120-121).

That the front or head brakeman is required to report to the engine on the ready track (which is about seventy-five feet south of the cinder pit (R., p. 125).

That he went out from the "ready track" at least five or six times at night, as shown by time cards, since the cinder pit was in operation (R., pp. 148-149-150).

That the fire tracks were in another part of the yard before the cinder pit was put into operation, but since that time they were "changed over" to the opposite side (R., p. 85).

What danger was there connected with the pit that Whitacre did not know? Indeed, what detail in its construction or its location was he unfamiliar with?

It is not necessary to make an argument that because he worked in the yard for nearly six months (in the case of *Kohn* v. *McNulta,* 147 U. S., 238, this Court held a brakeman to a full knowledge of a yard in which he worked only two months), and is shown to have left the "ready track" about twenty times, and not less than five times at night, he must be presumed to know what dangers are connected with the pit, because *he himself has testified* to a full and particular knowledge of the whole situation.

He was not ignorant that ashes floated on the water in the cinder pit, because he says "the cinders rise on top of the water and make it look like the ground," and he knew this fact before the accident happened, because he is particular to say no less than three separate times, that he has not been in the yard or around the cinder pit

since that time. This disposes of any argument that, in his ignorance, the plaintiff was injured because of the deceptive appearance of the pit due to the ashes. In this connection, it must be remembered that according to Whitacre the night of the accident was so dark, that even with a lantern, he could not see the round house, or the dry tank, or tell that a dark object was an engine until he held his lantern up, or the steel trestles which support the crane, which are twenty-five or thirty feet high and cover a space of two hundred feet by fifty-eight feet.

Whitacre even testified as to the struts which connect the uprights that support the crane, and as to how many tracks were over the pit. He described, and told the use of the tracks immediately north and south of the pit, that is, the "hump track," the dry ash track, and the two "ready tracks." He also located the coal tipple and the operator's cage that is suspended from the crane immediately over the pit, and actually knew that the four electric lights on the bottom of the cage were on a different circuit from the arc lights which surrounded the pit.

We could go on at length and show his knowledge with almost any feature of the yard or pit, but, in all sincerity, we do not feel it necessary to do so. When an experienced railroad man has testified to the minute details of the cinder pit, including the effect of ashes floating on the water, as Whitacre has done; and when on a night that is so dark that he cannot see large buildings, etc., he is able, through his knowledge of the locality, to walk into a railroad yard, and, without the least hesitation or difficulty, *by following the proper switches,* go to his engine which is standing on a "ready track" seventy-five feet away from the pit, which is two hundred feet by fifty-eight feet, and which has been in service for about six months, we think his knowledge and appreciation of

the danger of falling into the pit, from whatever cause, is not an open question.

Earlier in the argument we said that it was not a matter of real moment, under the facts of this case, whether the risk of falling into the pit was treated as an ordinary or as an extraordinary risk, because in either case the plaintiff would have *actual* knowledge and appreciation of the danger.

Strictly considered, however, we submit that the risk of falling into the cinder pit, on account of ashes floating on the water, absence of guard rails, location, etc., etc., is a typical example of an open, obvious, incidental and ordinary risk of the employment of a brakeman whose duties require him to go upon a "ready track" about seventy-five feet away from the side of the pit. It is, it seems to us, a clear case of *volenti non fit injuria* should the brakeman be so unfortunate as to meet with this kind of an accident.

There is nothing defective about the pit, nor is it unsuitable or unfit for the purpose for which it was built.

Its construction and method of operation are open and and obvious to the most casual inspection—"He who runs may read." Any one who has passed by it even once, we submit, must be familiar with the whole situation, including lack of guard rails, water, ashes, and the whole general *modus operandi. Gaffney, the plaintiff's expert, who testified to all the details of the pit, only saw it three times* (R., p. 52).

The places where railroad employés do their work are usually unsafe and dangerous as compared, for example, with fields where farm laborers are employed, but this is something which inheres in the nature of the work done, and which of necessity cannot be obviated. While a master does not agree or undertake to make a dangerous

place safe, he is, nevertheless, bound to furnish the servant a safe place in which to work. The whole meaning of this, however, is that he shall not subject the servant to any other danger in the "place" than such as is obvious and necessary.

The authorities on assumption of risk all bear out those propositions.

In *Southern Pacific Company* v. *Seley*, 152 U. S., 145, which was an action for the death of a brakeman resulting from his foot being caught in an unblocked frog situated in the railroad yard, the court said at pages 154-5:

> "The evidence showed that Seley had been in the employ of the defendant for several years as brakeman and as conductor of freight trains; that his duty brought him frequently into the yard in question to make up his trains; that he necessarily knew of the form of frog there in use; and it is not shown that he ever complained to his employers of the character of frogs used by them. He must, therefore, be assumed to have entered and continued in the employ of the defendant with full knowledge of the dangers asserted to arise out of the use of unblocked frogs."

In *Kohn* v. *McNulta*, 147 U. S., 238, at pages 240-1:

> "The intervenor was twenty-six years of age; he had been working as a blacksmith for about six years before entering into the employ of the defendant; he had been engaged in this work of coupling cars in the company's yard for over two months before the accident, and was therefore familiar with the tracks and conditions of the yard, and not inexperienced in the business. He claims that the Wabash freight cars, which constituted by far the larger number of cars which passed

through that yard, had none of those deadwoods or bumpers; but inasmuch as he had in fact seen and coupled cars like the ones that caused the accident, and that more than once, and as the deadwoods were obvious to any one attempting to make the coupling, and the danger from them apparent, it must be held that it was one of the risks which he assumed in entering upon the service. A railroad company is guilty of no negligence in receiving into its yards, and passing over its line, cars, freight or passenger, different from those it itself owns and uses.

"It is not pretended that these cars were out of repair, or in a defective condition, but simply that they were constructed differently from the Wabash cars, in that they had double deadwoods or bumpers of unusual length to protect the drawbars. But all this was obvious to even a passing glance, and the risk which there was in coupling such cars was apparent. It required no special skill or knowledge to detect it. The intervenor was no boy, placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to any one. Under those circumstances he assumed the risk of such an accident as this, and no negligence can be imputed to the employer."

In *Tuttle* v. *Milwaukee Railway*, 122 U. S., 189, which was an action for negligence resulting in the death of plaintiff alleged to have been caused in an attempt to couple cars, which were not constructed with bumpers, and on an unskillfully constructed sharp curve. After citing Judge Cooley's statement of the rule of assumption of risk, the court, on page 196, proceeded as follows:

"The defendant, as we have seen, had a right to construct its side-track with such curves as its

engineers deemed expedient and proper; and as to the draw-heads, and the absence of bumpers, the plaintiff herself abandoned all claim founded upon any supposed misconstruction of the cars in relation thereto. Then, it was clearly shown to be a not uncommon accident, especially on sharp curves, for the draw-heads of cars to slip by and pass each other. Tuttle, the deceased, entered into the employment of the defendant as a brakeman in the yard in question, with a full knowledge (actual or presumed) of all these things—the form of the sidetracks, the construction of the cars, and hazards incident to the service. Of one of these hazards he was unfortunately the victim. The only conclusion to be reached from these undoubted facts is, that he assumed the risks of the business."

In *Randall* v. *Baltimore and Ohio R. R. Co.*, 109 U. S., 478, 482-483, the court held that:

"A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another, and any one who enters the service of a railroad corporation, in any work connected with the making up or moving of trains, assumes the risks of that condition of things. Although it was night, and the plaintiff had not been in this yard before, his lantern afforded the means of perceiving the arrangement of the switch and the position of the adjacent tracks. The switch was of the form in common use, and was, to say the least, quite as fit for its place and purpose as an upright switch would have been. It could have been safely and efficiently worked by standing opposite the lock, midway between the tracks, using reasonable care; and it was unnecessary, in order to work it, to stand, as the plaintiff did, at the end of the handle, next the adjacent track."

In *Flaig* v. *Andrews Co.*, 141 Ky., 391, an experienced workman around rolling mills and blacksmith shops, fell into a pit in the shop in which he had been working for eight days at the time of the accident. He was assisting in cutting hot pieces of iron on a table which extended over the pit, which was eight feet wide, eighteen feet long and about ten feet deep. Pit was open and exposed on each side of the table, and was used as a dumping place for hot bars of iron as they were cut by shears. It was from three and one-half to four feet distant from the place where plaintiff was at work. The purpose of this pit was to provide a place where the heated pieces of iron which were cut off could be thrown and thus prevent injury to men working in the shop. It was necessary that the pit should remain open and unguarded as a railing around it would have seriously interfered, if not entirely destroyed its use. The Court held that plaintiff assumed the risk of falling into the pit and said:

> "While courts have uniformly held that it is the duty of the master to furnish the servant a reasonably safe place in which to work, they have likewise held that, where a servant accepts employment in a hazardous undertaking, knowing the dangers, he is presumed to have assumed the risk ordinarily incident thereto, and, if injury results no recovery can be had" (p. 400).
>
> "If any liability attaches whatever, it is for failure on the part of the master to cover up or guard the pit while the long bars were being cut. This pit was in constant use whenever the shears were being operated. Into it all the small bars and ends cut from the longer ones were dropped, and when the receptacles into which they were thrown were filled, they were lifted from the pit upon either side by means of a crane and carried

away to other parts of the building. To have surrounded it with a guard rail or covered it up would have been to practically destroyed its use. The small bars did not of themselves fall into the pit, but were thrown therein. * * * Since the bars had to be thrown into the receptacle in the pit, it was necessary that it should remain open whenever these bars were being cut. Hence a railing around it would have seriously interfered with, if it had not entirely destroyed, its use; and to have covered and uncovered it as each billet or bar was thrown into the receptacle therein would have for all practical purposes denied to the appellee the right to its use" (pp. 397-398).

In *Williams* v. *Louisville & N. R. R. Co.*, 111 Ky., 822, the Court held:

"Appellant alleges, in substance, that in appellee's engine and switch yard at Lexington, Ky., there is an ash pit twenty feet long, four feet wide, and three and one-half feet deep, located near one of the main thoroughfares in the yard, which is used as a receptacle for cinders and ashes which were removed from the fire boxes of their engines; that it was entirely without guards or other protection; that on the night of the 7th of November, 1898, while engaged in his duties as an employe of appellee in the yard, he fell into said ash pit, and was greatly injured thereby; that appellee did not advise him of the exposed condition of the ash pit during the night time.

"A demurrer was sustained to the petition * * * Finally, appellant declining to plead further, his petition was dismissed.

"There is no allegation—that appellant did not know of the existence, location and alleged dangerous condition of the ash pit of which complaint is made. Nor is there any averment that it was defectively constructed, or was unneces-

sary for the purpose for which it was used. In the absence of these necessary averments, we are of the opinion that the circuit judge did not err in the rulings complained of. An ash pit is a necessary adjunct of the railroad business in cleaning out engines employed by the company, and it is necessarily used at all hours of the day and night; and persons employed by the railroad company in such yards are bound to take notice of the existence, location, condition, and manner of use of such ash pits, assume all the risks ordinarily incident to such location" (pp. 824-825).

In *Glenn* v. *Ry. Co.*, 157 Ky., 453, the facts were as follows:

Glenn, a boiler maker's helper, who worked in the railroad shops, was found dead early one morning at the bottom of a drop pit nine feet deep by sixteen feet long, which was used for taking driving wheels off locomotives. There was a cover over one-third of this pit at either end but no cover over the center one-third portion. Glenn has been working in the shops for some time and understood the premises perfectly. There is no testimony of how the accident happened, as Glenn was last seen about five minutes before quitting time on the afternoon of the day before which his body was found in the pit. The accident happened after dark, and while there were lights in the shop plaintiff's evidence tended to show that these lights would not shine upon the drop pit and sufficiently illuminate it, and drop pit was only a few feet away from where the deceased was working all day. Action was brought under Federal employers' liability act, but the plaintiff was not allowed to recover as the court held that he assumed the risk of the danger of falling into the pit and that there was no negligence on the part of the railroad.

In *Wallace* v. *South Covington, etc., Ry. Co.*, 118, S. W., 962, the Court denied recovery, on the ground of assumption of risk, to an employé, who had worked four months in a street car barn, and who was injured while at work by falling into an open and unguarded pit which was necessary to enable workmen to go under the cars to make repairs.

In *Lindsay* v. *N. Y., N. H. & H. R. Co.*, 112 Fed., 384, a brakeman in the discharge of his duty fell into an uncovered sluice-way or drain which projected ten or twelve inches beyond the railroad ties and was injured by the cars he was attempting to couple. The court, at page 386, said:

> "The system of drainage, which was there when plaintiff came to the yard, was uniform. All the sluiceways or drain boxes were similarly constructed. There were 119 sluiceways or separate drain boxes, and double that number of openings in the yard, 28 of them near the place where the plaintiff was injured. Such substantial structures as these, projecting several inches into the pathway between the tracks along which plaintiff was continually moving, would seem to be 'plainly observable;' and the photographs, which were in evidence and whose accuracy is not disputed, show that there was nothing latent about the risk they introduced. If the plaintiff's sole opportunity of observation had been in the obscurity of night, he might have worked there a long time without observing them. But when it appears that during the months of April, May, and June, and the first week in July, he was moving back and forth over these open and projecting drains every day from daybreak until 7 a. m., he must be held chargeable with knowledge of their existence, and of whatever risk to one using the pathway their appearance would indicate even to the casual observer."

In *Riley* v. *Louisville & N. R. Co.*, 133 Fed., 904, a switchman's foot was caught and held in a hole or excavation under a spring rail frog, and while in this position he was run over by a moving car. The court, at page 907, held:

> "The spring rail frog where Riley was hurt was a reasonable appliance. The excavation under it was necessary for its proper operation. Such excavation was obvious. Any one giving heed could observe it. Riley's work was in the yards. There were 25 or 30 of these frogs there. It was his duty to know their location, construction, and mode of operation. He had been at work there some six months. It must be assumed he knew of these excavations. If there was danger in working about them, he assumed the risk. The testimony conclusively negatives any right to recover on his part against the railroad company."

In *Haggerty* v. *Chicago, M. & St. P. R. Co.*, 141 Fed., 966, a switch tender stepped into an uncovered drain in a railroad yard in the night time and injured his knee by falling on the rail. These drains were necessary for drainage in order that the yard might not become muddy and slippery, and it was impracticable to have them covered. At page 968 the Court said:

> "It was the duty of the railway company to use ordinary care to furnish Haggerty with a reasonably safe place in which to perform his duties, and it was also the duty of Haggerty to use ordinary care to not unnecessarily expose himself to dangers which he knew, or in the exercise of ordinary care might have known. He assumed, when he entered the employ of the company as switch tender upon the yards in question, the ordinary risks and hazards of the service in which he was en-

gaged, which he knew or which a reasonably prudent and careful man might have known. This case is clearly distinguishable from those cases where a master has allowed holes or culverts to remain uncovered at and about the place where the servant is obliged to perform his duties. The small ditch or drain in question was not what is known as a culvert, but a part of a system found necessary for the carrying off of surface water from the yards into larger drains or culverts, which were covered.

"We do not think that under the evidence in the record, the company was negligent in failing to cover this ditch or to place a danger signal there when it was cleaned out. We are of the opinion that the injury which Haggerty received resulted from one of the ordinary risks and hazards which he assumed when he entered the service of the company as switch tender and remained in such service upon the yards in question for the time stated in the evidence."

In *West* v. *Southern Pac. Co.*, 85 Fed., 392, a brakeman was injured by falling into an open culvert as he got off the train to turn a switch a long distance from the place assigned by the company for such service. The Court held, at page 394:

"The plaintiff cannot be heard to complain of any supposed neglect of the company in constructing its culverts without coverings. When he accepted service as a brakeman on this road, he knew of this condition of the culverts. For three years he continued in such service, with full knowledge of the fact, without objection. In this respect the rule 'volenti non fit injuria' applies. The servant is free to accept or refuse employment on a roadway of a particular construction."

In *Terry* v. *Schmidt,* 116 Fed., 627, a workman employed on a building fell through an unguarded air shaft and was injured. In dealing with the question of assumption of risk the Court said at page 628:

> "The decedent had been employed in this work on this building for some weeks, and had worked on this floor for two days. He was present when the forge was moved to the place where it was at the time of the accident, and he had passed and repassed the shaft in question a number of times on that day. One of the witnesses testified that decedent had been twelve trips back and forth with rivets between the place where the forge was moved for the last time and the place where the riveters were working. When a servant enters upon a hazardous employment, he assumes those risks which are open to his observation. When he continues in such service with knowledge of the character of the dangerous conditions or surroundings, he also assumes the hazards incident to the situation."

See also:

Seaboard Air Line *v.* Horton, 233 U. S., 492.

Central Vermont Ry. Co., *v.* Bethune, 206 Fed., 868.

Texas & Pacific Ry. Co. *v.* Harvey, 228 U. S., 319.

The most recent decisions of this Court, of which we are aware, on the subject of assumption of risk, are those of *Kanawha Ry.* v. *Kerse,* 239 U. S., 576, and *Seaboard Air Line* v. *Horton, id.* 595. In our argument we have not referred to these cases because, as in our opinion, neither one of them has any application to the facts now under discussion.

In *Kanawha Ry.* v. *Kerse,* which was a suit for the death of a brakeman, who was killed while on top of a box car in the performance of his duty, by being struck by a piece of timber fastened in a horizontal position across a switch track and at a height between three and four and one-half feet above the top of an ordinary box car, this court denied the application of the doctrine of assumption of risk on the express finding that the brakeman, previous to the time of the disaster, had never worked at the point of the accident and therefore could not have known of the existence of the piece of timber across the track.

In *Seaboard Air Line* v. *Horton,* the question under discussion was whether an employé assumed and appreciated the risk of a known defect, arising from the employer's negligence, in remaining in his employment under a promise by the employer to make good such defect. In dealing with this question the Court, at page 599, says:

> "To relieve the employer from responsibility for injuries that may befall the employé while remaining at his work in reliance upon a promise of reparation, there must be something more than knowledge by the employé that danger confronts him, or that it is constant. The danger must be imminent—immediately threatening—so as to render it clearly imprudent for him to confront it, even in the line of duty, pending the promise."

The Court then holds, under the facts of the case, that the danger which Horton exposed himself to was not so "imminent" or "immediately threatening" as to justify the application of the doctrine of assumption of risk.

CONCLUSION.

The assignments of error include exceptions to testimony dealing with negligence under the Act, and instructions, granted and refused, by the trial court both as to assumption of risk and negligence. While we consider that there is error in these rulings, and do not wish to be understood as having abandoned these portions of the assignments of error, we have not considered it necessary to include them in our argument.

We feel that this case is one that should be argued and decided on broad principles, and that it would serve no good purpose to confuse matters with the relevancy of evidence, or propriety or impropriety of instructions granted and refused by the trial court.

The principles of law which govern this case are fixed and definite, and the material facts are practically undisputed. All that the Court has to do, it seems to us, is to apply the settled principles of law to the undisputed facts in the case.

We earnestly contend:

First, that the defendant as the employer of the plaintiff has not been guilty of negligence;

Second, that the chance of an accident such as befell the plaintiff is an ordinary risk incidental to the nature of his employment;

Third, that whether the plaintiff did assume the risk

of the accident is to be determined by Federal and not by State authority.

In conclusion, we submit that the judgment in this case must be reversed.

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(9) McCann vs. Atlantic Mills 20 R. I. 566.
(10) Mondou vs. N. Y. N. H. & H. Ry. Co. 223 U. S. 50, 56 Law Ed. 346.
(11) Missouri, K. & T. R. Co., vs. United States, 231 U. S. 112, 58 Law Ed. 144, 34 Sup. Ct. Rep. 26.
(12) Meyers vs. Pittsburg Coal Co., 233 U. S. 184, 58 Law Ed. 907.
(13) Miedrich vs. Leuenstein, 232 U. S. 242, 58 Law Ed. 589.
(14) McDade Case, 191 U. S. 96.
(15) North Carolina R. Co. vs. Zachary, 232 U. S. 256, 58 Law Ed. 595.

(16) Norfolk & W. R. R. Co., vs. Earnest, 229, U. S. 117, 57 Law Ed. 1097.
(17) P. W. & B. R. vs. Tucker 220, W. S. 607, 55, Law Ed. 607, 35, App. D. C. 123.
(18) Pederson vs. Delaware L. & R. R. Co., 229 U. S. 146, 57 Law Ed, 1125, 33 Sup. Ct. Rep. 648.
(19) Rankin vs. Emigh, 218 U. S. 27, 54 Law Ed. 915.
(20) Russel's Case, 88 Md. 571.
(21) Seaboard Air Line vs. Horton, 239 U. S.——, and 233 U. S. 492, 58 Law Ed. 1062.
(22) Seaboard Air Line vs. Padgett, 233 U. S. 668.
(23) Seaboard Air Line vs. Koennecke, 239 U. S. ——.
(24) Seaboard Air Line vs. Moore, 228 U. S. 434, 57 Law Ed. 907.
(25) Slemmer vs. Buffalo Railroad Co., 205 U. S. 11, 51 Law Ed. 686.
(26) St. Louis S. T. & T. R. Co., vs. Seale, 229 U. S. 156, 57 Law Ed. 1129, 33 Sup. Ct. Rep. 651.
(27) Seaboard Air Line vs. Horton, 233 U. S. 506, 58, Law Ed. 1070.
(28) Sherman and Redfield, Section 207D and 207E, Vol. 1, Sixth Ed. 1913.
(29) Southern R. R. vs. Crockett 234 U. S. 730.
(30) Texas and P. R. Co., vs. Archbald, 170 U. S. 673, 42 Law Ed. 1191.
(31) Texas and P. R. vs. Swearigen, 196 U. S. 51, 49 Law Ed. 328—25 Sup. Ct. Rep. 164.
(32) Water Pierce Oil Co., vs. Texas, 212 U. S. 86, 107, 53 Law Ed. 417, 428.
(33) Wood vs. Heiges 83 Md. 257.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1916

No. 374

BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR. vs. HARVEY W. C. WHITACRE, DEFENDANT IN ERROR.	In Error to the Court of Appeals of the State of Maryland

BRIEF FOR DEFENDANT IN ERROR.

For convenience, and following the terms employed in this case by the Court of Appeals of Maryland, the plaintiff in error will be referred to as the defendant, and the defendant in error as the plaintiff.

STATEMENT OF THE CASE.

Judge Stockbridge, who delivered the opinion for the Court of Appeals of Maryland, briefly states the important facts as follows:

> "Harvey W. C. Whitacre had been for several years an employee of the Baltimore and Ohio Railroad Company as a brakeman, and at the time of the happening of the accident in question, June

23rd, 1913, was what is known as front brakeman on a freight train, having a run from Cumberland, in the State of Maryland, to the Cumbo Yards, near Martinsburg, in the State of West Virginia. The railroad was at the time a common carrier, engaged in doing interstate business, and the employment of Whitacre was in the conduct of interstate business. On the morning of the day named, Whitacre was called about one o'clock, with orders to join a train in his capacity of brakeman, which was to leave Cumberland at two o'clock. In response to that call, at or about the appointed time, he reported at the caller's office, and then proceeded through the yard of the railroad company to join the engine, which was to be coupled to the train at the Evitts Creek Yard, some half-mile distant. The locomotive was then standing upon a "ready track," and as the brakeman approached it he did not see the engineer, but did see the fireman, and Whitacre put on his working clothes. He then inquired of the fireman whether he was ready to start, and he received the answer, "No, not quite." "The tool boy had not been there and had left him no tin cup, and he asked me to go and hunt the tool boy and get a tin cup." This is the testimony of the plaintiff himself. The fireman's version differs somewhat. Acting upon what the plaintiff understood to be the order or request of the fireman, he did start to look for the tool boy and tin cup, and saw at a little distance a moving light, which he followed, supposing it to be a lantern in the hands of the tool boy. Suddenly the light disappeared around some object, subsequently ascertained to be an engine. The plaintiff then took a few steps backward and fell into a cinder pit, which was near the center of the yard, and used for the purpose of raking the cinders into from the firepan of the locomotive. This cinder pit was of large size, approximately 180 feet in length by 50 feet in breadth, and varying in depth from 3½ to 9 feet. It was of recent construction,

having been in use but about six months, and was known as a water pit as distinguished from a dry pit. There was no railing around the pit, but at or near the center it was spanned by iron or steel beams, upon which was worked a travelling crane, that was used in the day time for the removal of cinders from the pit. The allegations contained in the declaration, and borne out in the testimony, were to the effect that it had been raining; that the night was somewhat thick and foggy, and that the top of the water in the pit was covered to a greater or less extent with ashes, which made it difficult, if not impossible to distinguish it in appearance from solid ground. When the plaintiff fell into the pit he was wetted up to his waist, and fell across an iron bar or rail, but clambered out, returned to his engine without the tin cup, and the engine proceeded to the Evitts Creek Yard, where it was attached to the cars to be hauled to the Cumbo Yard. The plaintiff performed a portion, if not all of his regular duties as brakeman, which involved getting down and coupling and uncoupling the air pipes between the tender of the engine and the front freight car. This operation was repeated several times between Cumberland and the Cumbo Yard. He did, however, while on the trip complain of his accident to the conductor of the train, and an accident report was made out at Hansrote, one of the intermediate stations. From the Cumbo Yard the plaintiff returned to Cumberland on a passenger train. The following day he consulted a physician, who after examining him found a rupture for which an operation was performed, and from which he recovered. After some months the plaintiff complained of pain in his spine, for which he was treated by applying a white hot iron; and still later there developed what was claimed to be a fracture of the bone of the thigh containing the socket, with which the head of the femur articulates. These are in substance the injuries to recover for which the suit was brought." (Record pp. 167—168 and 169.)

The pit was entirely filled with water, covered with floating ashes, so that the surface of the water and ashes were on a level with the surrounding land on the side next to the ready tracks wherein the plaintiff fell.

There is a conflict in the testimony as to whether the lights had been placed on the poles prior to the accident, and serious conflict in the testimony as to whether any lights at all were burning the night of the accident.

The Jury, and the Court of Appeals of Maryland, had the benefit of certain photographs, some offered by the plaintiff, and some by the defendant, those of the plaintiff being taken on August 12th and August 13th, 1913, that is to say, within six weeks of the accident, (record pp. 19-20), and those of the defendant being taken December 11th, and 13th, 1913, and February 5th, 1914, when the snow was on the ground, about six months after the accident, (Record p. 48). This court will not have the benefit of these pictures, as it is just been found that they were lost by the Clerk of the Court of Appeals:

All freight trains moving eastward started on one of these two ready tracks on the south side, and therefore a large number of trainmen were necessarily required to be in the neighborhood of the ready tracks at all hours of the day and night. Although the cinder pit is not exactly in the center of the railroad yards, it is very nearly in the central part of the yard as far as the activities of the trainmen are concerned. The ready tracks for trains moving westward were placed on the north of the cinder pit.

It does not appear that Whitacre was required to start from this point at night, except upon three or four occasions. Whitacre's engine was scheduled to leave at two o'clock, A. M., and he came to the engine "a couple of minutes of two o'clock, put on his clothes, looked at his watch and it was a minute or two after two o'clock" (Record p. 39). After the accident Whitacre groped his way in the darkness and found his engine.

"Q. How long after you became conscious was it before you got back to the engine?

"A. I do not know, but it was a right smart little bit.

"Q. Can you give us any idea?
"A. I do not know exactly, it might have been eight or ten minutes. I have an idea I was eight or ten minutes getting the twenty-five steps.

"Q. Did you call anybody?
"A. No sir.

"Q. You were going back by yourself.
"A. Yes sir. I was hunting my way when that man passed me.

"Q. Did you have any light when you got out of the pit?
"A. No sir.

"Q. How did you get back?
"A. I hunted my way back in the dark.

"Q. Did you have any trouble?
"A. Yes sir.
(Record p. 39).

This case was tried upon issue joined to the general issue plea to the third count of the declaration, (Record p. 7-8-9). The first trial before Judge Robert R. Henderson, at Cumberland, Maryland, resulted in a disagreement of the jury, and the case being removed to the Circuit Court for Washington County was retried before Judge Robert R. Henderson and Judge Martin L. Keedy, and resulted in a verdict for the plaintiff, upon which judgment was entered and appeal taken by the defendant. The rulings of the Court below, sustaining the declaration on demurrer, and on forty-six exceptions as to testimony, and with reference to three prayers of the plaintiff and seventeen prayers of the defendant, were unanimously sustained by the Court of Appeals of Maryland.

Although it was most strongly urged at the trial court and in the Court of Appeals, that the plaintiff was not

engaged in interstate commerce at the time of his injury, it is now admitted by the defendant that the plaintiff was engaged in commerce between the states at the time of the accident. (Defendant's brief, p. 10.) It has never been contended that the defendant was not engaged in interstate commerce.

There are but three assignments of error alleged by the defendant in this record, and these will be discussed in their order, although they do not seem to be specified, either in the record or defendant's brief, in the manner required by the rules of this Court.

LAW AND EVIDENCE.

DEFENDANT'S FIRST SPECIFICATION

The Court of Appeals of Maryland did not err in holding on the facts of this case, that the defendant was negligent under the provisions of the Federal Employers' Liability Act of April 22nd, 1908.

The plaintiff while in the actual service of the defendant, in the darkness of the night, fell into the large water cinder pit, from three and one-half to nine feet deep, in the central part of the Cumberland railroad yards, without guards, and without lights, about which trainmen and other employees day and night were required to pass to and fro in reaching their engines and making up their trains. The testimony of experienced railroad engineers was that the pit was not properly constructed as to safety, in that it should have been provided with guard rails by which numbers of men who were required to work in its vicinity would have been protected and the accident for which this action is brought prevented. (Record pp. 61–68.) Although the evidence of the experts for the plaintiff and defendant as to whether guard rails could have been provided without hampering the employees, is conflicting, the duty of the defendant to keep the pit lighted at night is clearly established without question.

There were two ready tracks about seventy-five feet on the south side from this cinder pit, from which all trains moving east had to start, and besides other tracks in the vicinity. The pit was 180 or 200 feet in length, and on the same level with the ground south of it, and with the ready tracks. There were no barriers covering a space of 140 feet at least of the total length of 180 feet of the pit and the spaces between the uprights, 18 or 20 feet wide. This deep pit was filled with water and ashes, and cinders floating on the surface had a dark gray color corresponding with the ground about the pit which had a like color from the ashes and cinders thrown from the engines. So the water in the pit looked like the solid ground surrounding it, and particularly so at night. It was a dark foggy night and had been raining. The testimony of the plaintiff which was corroborated by pictures, was to the effect that no lights were burning that night. It was also shown by the plaintiff's witnesses that the frame work for the crane could have been widened or the barriers built so as to move up and down, so that they would not interfere with the employees in raking ashes from the pit, (Record p. 55)..

As a result of the accident the plaintiff was permannently injured and is suffering from a fracture of the socket and ankylosis of the spine and other disabilities (Record p. 48).

The Court of Appeals affirmed the lower court as to the admissibility of the testimony of the engineers, who testified as experts that the pit was negligently constructed by reason of the absence of guards, and upon this question of general law its ruling is final. Indeed we do not understand that any question as to the admissibility of this evidence is now raised.

Although the testimony shows that the cinder pit is of modern design and well adapted for the purpose for which it is constructed and maintained, it is of such modern design that there is not one like it on the whole Pennsylvania Railroad system. (John R. Alexander, General Road Foreman Pa. R. R. Co. Record p. 95). There seems to have been only three or four in use in

the United States, as far as the witnesses knew, although the defendant produced numerous witnesses from other railroad systems to testify in its behalf.

The defendant contends that the absence of guards on other pits determines that the defendant was not negligent (brief p. 38) but it forgets that they are of very recent construction and there only two or three other water pits in this country and there is no evidence as to whether they are placed in an environment similar to that of defendant.

James P. Gaffney and J. B. Ferguson, railroad engineers of many years experience, after qualifying as experts, both testified that the cinder pit was not safely constructed and maintained.

James P. Gaffney, Record p. 53:

Q. Will you state whether the cinder pit as constructed and maintained by the Baltimore and Ohio Railroad is or is not safely constructed and maintained?

A. I consider it very unsafe.

Q. In what respect?

A. Inasmuch as persons crossing the track might walk into it inadvertently not knowing where he was going.

James P. Gaffney, Record p. 54:

Q. Will you state to jury in what way that cinder pit could have been made reasonably safe?

A. There are several ways in which it could have been made safe. By having gates there or bars along continuous as you saw in the struts to prevent any person from walking across the track from falling into that pit—as a farm gate, an elevator gate or any kind of a simple or movable bar—a three by four bar or a two by six bar dropped down that would prevent a person from walking across, or they might have put signs there—danger

signs—just as any danger sign might avoid any person inadvertently from walking in.

J. B. Ferguson, Record pp. 62-63:

Q. Mr. Ferguson, what do you know about the construction of cinder pits?
A. I never saw the one at Cumberland.

Q. Do you know anything about the construction of cinder pits?
A. I have spent ten or twelve years around railroads. I had charge of this one at Thorndale which took about ten or twelve years to construct and during my experience with railroads I was working around the yards. I have traveled a great deal on freight trains. I lived near a railroad yard and passed by railroad yards many times at night.
(By the Court).

Q. Any cinder pits there?
A. Yes sir.

(By the Court). If he means to say from what he has said about what he knows of other cinder pits, then he may go on.
A. I can understand; I think that at times the cinder pits would be dangerous.
(Objection).

Q. Just answer the question?
A. I think not.
And the witness further testified:

Q. Can you say whether it is or not?
A. I would say it is not.

J. B. Ferguson, Record pp. 67–68.

Q. Mr. Ferguson, in your capacity as an engineer, can you state whether there is any simple and

reasonably inexpensive way to protect that pit at Cumberland, from danger to persons in the neighborhood of it?

A. I would agree with the suggestion made by Mr. Gaffney which is shown in every third panel could be reasonably placed in every panel or some sort of a rail to prevent a man from passing by the overhead structure, or by a simple system of lights.

And the witness further testified:

Q. What system of lights?

A. Lights on lines as are often employed at stations to display danger signals.

Q. Lights stationed at this ash pit, where?

A. To guard the four approaches at each end and the side.

Q. Do you mean to put on a rail fifty feet high, or down on a level with a man's eyes?

A. On a level with a man's eyes.

Q. This would be reasonably inexpensive and safe?

A. I think so.

Under this testimony it was for the jury to pass upon the question of the negligence of the defendant in failing to provide guard rails and as to insufficiency of illumination. This question was submitted to the jury by the plaintiff's first instruction, and by defendant's fifth and tenth instructions, and the jury were instructed not to find for the plaintiff unless they found that the defendant was negligent in the construction, operation or maintenance of the pit, and that defendant's negligence contributed to the injury. (Record pp. 158, 161 and 163).

The plaintiff's evidence of defendant's negligence is only contradicted by testimony of defendant offered to show that barriers, if placed between the uprights as

now maintained, would hamper the men removing cinders from the engines, and to prove that lights were burning over the pit the night of the accident. But under this conflicting testimony it was certainly the province of the jury and not of the court, to determine whether the defendant was guilty of negligence.

Seaboard Air Line vs. Padgett, 236 U. S. 668.
Meyers vs. Pittsburg Coal Co. 233 U. S. 184, 58 Law Ed. P. 907.
American Railroad Co. vs. Didrickson, 227 U. S. 145, 57 Law Ed. 446.

Whitacre, on cross-examination testified that no lights were burning at the pit the night of the accident—Here is his testimony:

Whitacre, (Record page 30).

Q. You know the location of the cinder pit?
A. No sir.

Q. Do you mean to tell the jury that you did not know the location of the cinder pit when you went there twenty times?
A. Yes sir, I did not.

Q. You knew the location of the cinder pit in the day time, did you not?
A. Not very good, I did not.

Q. Did you know it?
A. I knew there was a cinder pit there some place.

Q. Did you know where it was with reference to the ready track?
A. I did not until I was injured.
(Record p. 34.)

Q. Then you knew where the cinder pit was?
A. I said that I had passed the pit but had not examined it to know just where it was.

(Record p. 32.)

Q. Will you take the photograph, Mr. Whitacre, and get your bearings and give us an idea of what it is and state if that is a fair representation of the various structures around there? Witness is shown photograph.
A. Those lights were not there.

Q. I am not going to ask you anything about the lights, which lights are you speaking about?
A. You asked me about the representation.

Q. Is it a fair representation of the location?
A. Yes sir, leaving the lights off.

Whitacre (Record Page 37).

Q. Do you know the four lights?
A. They were not there that night.

Q. Were they not burning that night?
A. No sir, they only burn when the crane is in operation.

Whitacre (Record p. 38.)

Q. Where did you fall in?
A. Right in front of the pilot.

Q. Were there any lights around there?
A. No sir.

On direct testimony, Whitacre testified as to the absence of burning lights, as follows:

Q. Will you state to the jury whether any lights were burning that night?
A. No, sir, there was not. (Record page 21.)

The defendant states that the absence of lights is not alleged in the declaration (brief p. 41), but it is alleged that "the pit was concealed in the darkness and the plaintiff could not see the pit and avoid the dangerous place." (Record p. 8.)

This court will not revise the concurrent judgment of the two courts below on the evidence for it has repeatedly held that in cases coming before it from the Supreme Court of a State it accepts as binding the findings upon issues of fact duly made in that court, except in that exceptional class of cases where what purports to be a finding is not strictly such but is so involved with questions of law bearing upon the alleged Federal right as to be a decision of those questions rather than a pure question of fact or where there is that entire lack of evidence to support the conclusion upon the Federal question that gives this court the right to review.

Miedrich vs. Lauenstein, 232 U. S. 242, 58 Law Ed. 589.

Water Pierce Oil Co., vs. Texas, 212 U. S. 86, 107, 53 Law Ed. 417, 428.

Rankin vs. Emigh, 218 U. S. 27, 59 Law Ed. 915.

Seaboard Air Line vs. Koennecke, 239 U. S. ——.

The appellate court properly held that the negligence of defendant was of two descriptions: "One the insufficient lighting of the pit in regard to which there was a conflict of evidence whether the electric lights which had been placed there were or were not burning at the time of the happening of the accident, so as to give a good illumination of the pit; and, second, that the pit was a dangerous appliance for the purpose for which it was designed and used by reason of the absence of guard

rails. Upon this phase also there was a conflict of evidence."

B. & O. R. R. Co. vs. Whitacre, 124 Md. 428, (Record page 170).

The clear and positive testimony of Whitacre as to the absence of burning lights the night of the accident, and of Gaffney and Ferguson as to the unsafety of the cinder pit in the manner in which it was maintained, clearly proves that the defendant was negligent under the provisions of the Federal Employers' Liability Act of 1908, and the defendant's first assignment of error cannot be sustained.

DEFENDANT'S SECOND SPECIFICATION

The appellate and trial courts did not err in holding that on the facts of the case, the doctrine of assumption of risk did not apply, or rather in refusing an instruction that the case be with-drawn from the jury on the ground that the plaintiff had assumed the risk of the danger as an incident to his employment.

The defendant offered three prayers upon the question of assumption of risk, but they were rejected by the judges of the trial court, and their ruling was affirmed unanimously by the Court of Appeals.

These prayers are as follows:

DEFENDANT'S NINTH PRAYER.

"If they find from the evidence that the construction of the cinder pit in the east-bound yard of the defendant, referred to in the evidence was completed and put in operation on or about January 1st, 1913, and was of modern design and well constructed, and was maintained and operated as cinder pits are usually and generally maintained and operated by railroads, and that the plaintiff, before the injury complained of in this suit, had

been employed by the defendant as a brakeman, running in and out of the said east-bound yard of the defendant, for three years next preceding said injury, and during the time of the construction of said cinder pit, and saw the progress of the work thereon, and well knew the location, character and design of said cinder pit, from having seen the same many times, then the plaintiff assumed the risk and danger of falling into said cinder-pit, and their verdict must be for the defendant even if they further find from the evidence that said cinder pit was not protected by guard rails or other barriers on the sides thereof, and that the plaintiff fell into said cinder pit and was injured." (Record page 162.)

DEFENDANT'S ELEVENTH PRAYER.

"If they find from the evidence that when the plaintiff entered into the service of the defendant and remained therein, after the construction and operation of the cinder pit mentioned in the evidence if the jury shall so find, with knowledge of the location and construction of said cinder pit, with relation to the position of his engine spoken of in evidence on the night of the accident, the plaintiff assumed all the natural and ordinary risks and perils of his employment by the defendant as a brakeman in and about said yard, and the risk of falling into said cinder pit, and the plaintiff cannot recover for any injury which the jury may find he sustained by failing therein." (Record p. 163.)

DEFENDANT'S TWELFTH PRAYER.

If they find from the evidence that the plaintiff had been in and out of the yard of the defendant in the neighborhood of the cinder pit mentioned in evidence as many as twenty times or thereabouts, in the day time, and once at night, between the time

when the said cinder pit was put in operation, about January, 1913, and the date of the accident, June 23rd, 1913, if the jury shall so find, that then the plaintiff had ample opportunity to ascertain and know the location of said cinder pit with reference to the track on which his engine stood on the night of the accident, and to know that said cinder pit was not protected at the sides by railings or barriers, of any kind, and the jury are further instructed that then the danger of falling into said pit was one of the risks or perils of the employment of the plaintiff, which he assumed in entering into said employment and remaining therein after he had such knowledge of the location and condition of said pit, or such opportunity of acquiring such knowledge, and their verdict must be for the defendant." (Record page 164.)

Under the practice in Maryland the trial court is not required to instruct or charge the jury, but is required only to rule upon the prayers offered, that is, to grant or reject them, and the granted prayers become all the instructions of the court, unless of its own motion the court gives instructions of its own. These three prayers were properly rejected, even if the question of assumption of risk was a proper one for the jury in this case. They segregate certain facts offered in evidence by defendant and make them the basis for a verdict for defendant and ignore testimony of plaintiff and other essential facts. They all ignore the testimony that the lights were not burning the night of the accident, that the pit was unguarded, that ashes floated on the surface of the water giving it the appearance at night of dry land, and they ignore the testimony that the accident happened upon a foggy night when the plaintiff could have been easily deceived by the appearance of the water, or confused in the darkness as to the location of the pit, and further, make no reference to the fact that the employment of the plaintiff had no connection with the cinder pit.

Altho the court rejected these three prayers, and

other instructions directing a verdict for the defendant they granted the defendant's tenth prayer in connection with the plaintiff's first prayer, which submitted the whole question to the jury, describing all the conditions set forth in the ninth, eleventh and twelfth prayers, and setting forth the position of the defendant, by which it contended that the defendant was not guilty of negligence and that the accident was caused wholly by plaintiff's negligence or by his assumption of the risk.

Altho this tenth prayer does not in words use the legal term "assumption of risk" it sets forth all the facts proven by defendant as a defense and required the jury to pass upon them and gave defendant the full benefit of the testimony upon which it relied.

The defendant's tenth prayer is as follows:

> "The defendant prays the Court to instruct the jury that, if they believe from the evidence that the cinder pit referred to in evidence was constructed by the defendant, in its east-bound yard after such design and according to such plan as is generally employed by railroad companies reasonably and prudently managed in the construction of such pits (under similar conditions), and that such pit was a necessary part of the equipment of the defendant, and was maintained and operated in the same way as such railroads generally maintain and operate such pits (under similar conditions, as aforesaid), and that said cinder pit could not be properly and effectually maintained and operated for the purpose for which it was designed, with guard rails on one or both sides thereof, and that said cinder pit was lighted by four arc electric lights, (at the time of the accident), and that its construction, location and maintenance were well and fully known by the plaintiff, (and that all the conditions surrounding the plaintiff were then and there such as to enable ony one in the possession of his faculties walking in said yard in the immediate

vicinity to recognize his whereabouts with reference to said pit and to see the pit by the exercise of ordinary care on his part), then the construction, maintenance and operation of said cinder pit, without guard rails or other barriers, on either side thereof, was not negligence on the part of the defendant, and their verdict must be for the defendant, even though the jury may further find that the plaintiff fell into said cinder pit and was injured because it was not protected on the side by guard rails or barriers." (Record page 163).

The plaintiff was a front brakeman, whose particular duties were concerned with the engine on the tracks, and had no relation to the cinder pit. There is no evidence that he had paid any particular attention to the pit, although he must have seen it at a distance in the day time in the course of his employment. He did not pass the pit on his way through the yard to or from the engine—The danger of falling into the pit was not an open and obvious one to him in the course of his employment, and it could not be said that with full knowledge of the peril of it in connection with his employment he continued to perform his work. The plaintiff assumed all the risks of the dangers which were open and obvious, but not of the danger which arose from the negligence of the defendant of which he did not have full knowledge before the injury. He fell into it at night when confusion as to location was easy and natural to one whose business did not call him to the pit.

There is no question of assumption of risk in this case, but rather one of contributory negligence, which was fully submitted to the jury.

As the appellate court said: "The act of the plaintiff in going about the yard as he had, was one to be viewed rather as contributory negligence than as assumption of risk, and that aspect of the case was fully and properly covered by the plaintiff's third prayer." (Record p. 172.)

Again, the Court of Appeals says: "But the performance of his duties was not at the cinder pit, nor was he necessarily placed in the position with relation to it where he must be construed by law to have known whether it was a dangerous appliance or not, and he had a right to assume that as constructed it was a proper and safe appliance."

In the case of Slemmer vs. Buffalo Railroad Company, 205 U. S. Page 11, (51 L. Ed. 686), the Supreme Court said:

> "Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground. Choctaw, O. & G. R. Co., vs. McDade, 191 U. S. 64, 48 L. Ed. 96, 100, 24 Sup. Ct. Rep. 24. Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment, or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligence. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defence of contributory negligence still open to the master, (a matter upon which we express no opinion), then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name."

The only risk employees can assume are those of their employment, but they must be open and obviously

connected with their employment. The matter must not expose the servant to the risk of danger not incident to his employment, and the servant has a right to assume absence of negligence on the part of the master. This servant's particular duties took him regularly and especially to the engine which was on the ready track, but generally to certain parts of the yard in passing to his engine, and the master's duty was to provide the cinder pit with guards, or to see that it was made safe at night by lights, or otherwise, and its failure to do this was negligence which the plaintiff did not assume. There is no testimony that the plaintiff knew before the accident that the ashes floated over the surface of the water in such a way as to give it the appearance of dry land at night, and that there was maintained in the yard a hidden or concealed trap in this pit, which in the darkness would naturally lead a passerby into peril. Under the contention of the defendant, it would have the court sacrifice the plaintiff's right to go to the jury with his case under the statute upon contributory negligence, by giving it the name of assumption of risk.

A requested instructed upon assumption of risk is properly refused when

> "It is couched in such general and sweeping terms that it is not calculated to give the jury an accurate understanding of the law upon that subject, or to direct their attention to the particular phase of the case to which it is applicable."
>
> *Norfolk and W. R. R. Co. vs. Earnest, 229 U. S. 114, 57 Law Ed. 1096.*
> *Illinois Central R. R. Co. vs. Skaggs, 239 U. S. 249.*

The very recent case of Seaboard Air Line vs. Horton 239 U. S. —— and 233 U. S. 492, 58 Law Ed. 1062 decides that the danger must be not only imminent but obvious to the employe before the case can be withdrawn from the jury on the ground of assumption of risk or contributory negligence.

The defendant's ninth, eleventh and twelfth prayers,

which undertake to submit the question of assumption of risk to the jury, are therefore so obviously defective in failing to refer to the darkness, the probability of his confusion as to location, the absence of lights, and guards, the deceitfulness of the floating ashes, and in assuming that the plaintiff had ample previous knowledge of this condition of the pit, which is unsupported by the evidence, that the defendant cannot complain of their rejection.

The defendant's tenth instruction modified as shown by parentheses), as the appellate court well says, fully covers all the facts set forth in the defendant's ninth, eleventh and twelfth prayers, and gives the defendant the full benefit of its defenses in so far as the evidence affords a defense.

In the McDade case, 191 U. S. 96, where a brakeman was killed as the result of a collision with an over-hanging water-spout on a water tank, the Supreme Court rules than an employee assumes the risk of injury from defective appliances furnished by his employer, only when the defect is known to or plainly observable by the employee.

The above was a case in which the question of the assumption of risk was a proper one for the jury, but in the opinion Mr. Justice Day says:

> "The servant assumes the risk of dangers incidental to the business of the master, but not of the latter's negligence. The question of assumption of risk is quite apart from that of contributory negligence. The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duty. The employee is not obliged to pass judgment upon the employer in the transaction of his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that where a defect is known to the employee, or is so

> patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and in such case cannot recover. The charge of the court upon the assumption of risk was more favorable to the plaintiff in error than the law required, as it exonerated the railroad company from fault, if in the exercise of ordinary care, *McDade* might have discovered the danger. Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employee."

But in the case at bar, the plaintiff had no knowledge of the danger for this was not an appliance associated with his employment as a brakeman. It was the duty of the defendant to provide lights at night, or guard rails and perhaps both, and its failure to perform this duty was negligence of the defendant, and the plaintiff could not assume the risk of that negligence. There is no testimony from which the court or jury could find that the plaintiff knew before the accident that the ashes floated over the surface of the water in such a way as to give it the appearance at night of dry land, or, in other words, knew that there was a concealed lake in the yard, except his testimony given from an examination of the pictures which showed that condition, and the plaintiff could not have been expected to give up his employment because of danger which he could not anticipate.

In *Russell's case, 88 Md., 521*, the Court said:

> "The plaintiff was obliged to observe and guard himself against the danger from the poles as properly and apparently located; but one or more of

them had been negligently and improperly placed, so that the usual risk of the service was increased; and as such misplacement was not apparent to him with the exercise of reasonable care, and was not in fact known to him, he was under no obligation to protect himself against such increased risk. In such case the increased danger would be hidden and secret, and no rule of law demands that one shall look out for what he has no reason to anticipate."

In the case at bar, the plaintiff may have been guilty of contributory negligence, but this could not bar recovery, if the defendant was at all negligent, and the trial court submitted that question fairly to the jury and instructed them as to its consequences.

Geis case, 31 Md. 366.
Sherman & Redfield, Section 207D and 207E, Vol. 1, Sixth Ed. 1913.

The brief of the plaintiff in error cites numerous cases wherein laborers, employed as yard workmen, are held to have assumed the risk of dangerous agencies or places in the yard and closely associated with their employment, but Whitacre was not a yard employee. He was a front brakeman on a train, a trainman whose duties had to do solely with the movement of his engine and trains. He worked only on the engine and on the track and switches over which his engine moved.

As the practical difference of the two ideas of contributory negligence and assumption of risk, is in the degree of their proximity to the particular harm, and the act more immediately leading to the specific accident is to be called contributory negligence, as stated by Mr. Justice Holmes in the *Slemmer case*, the act of the plaintiff in leaving his engine and going out into the yard in search of the tin cup, must rather be associated with the idea of contributory negligence than that of assumption of risk. It could not be both, and when the court granted the defendant's tenth prayer under which the plaintiff's recovery might be precluded, and

also submitted to the jury the question of contributory negligence in plaintiff's second and third prayers, by which the plaintiff's recovery of damages might have been either precluded or diminished, we respectfully submit that the defendant received instructions far more favorable than it was entitled to.

On pages 48 to 51 of defendant's brief, it enumerates many facts stated by Whitacre and emphasizes his knowledge of the cinder pit and the structures and tracks surrounding it, but omits to state that he was testifying from photographs, blue prints and maps then shown to him and was pointing out objects on these exhibits which he could have designated if he had never seen the pit. His knowledge of the depth of the pit came from a man who helped build it, with whom he boarded. (Record p. 46.) And the photographs in his hands showed that the water and ashes looked like dry land.

In the case of *Seaboard Air Line Ry. vs. Padgett, supra, 233 U. S. 668, supra,* in which the plaintiff's intestate fell into a drop pit in the defendant's roundhouse in the darkness of the early morning, the negligence charged and proven was the absence of lights and guards as in the case at bar and this Court held the question of negligence of the defendant was for the jury and that whether the instructions could have produced misconceptions in the minds of the jury was not to be ascertained by merely considering isolated statements but by taking into view all the instructions given and the tendencies of the proof in the case to which they were applied.

Where the Court fairly submitted to the jury the questions involved in a charge to which there is no substantial objection, and where the instructions requested by defendant as to assumption of risk are likely to confuse the jury, the defendant is not entitled to a reversal because of a failure to grant them.

Seaboard Air Line Co. vs. Moore, 228 U. S. 434. 57 Law Ed. 907.

Where the elements and combinations out of which the danger arises are visible it can not always be said that the danger itself is so apparent that the employee must be held to have assumed the risk of it. When the visible conditions have been of recent origin and danger arising from them obscure and in many other cases that could be stated, the question of assumption of risk is plainly for the jury.

Butler vs. Frazee, 211 U. S. 467, 53 Law Ed. 285.
Texas & P. R. vs. Swearingen, 196 U. S. 51, 49 Law Ed. 328—25 Sup. Ct. Rep. 164.
Fitzgerald vs. Connecticut River Paper Co. 155 Mass. 41 Am. St. Rep. 537, 29 N. E. 464.

Inasmuch as the brief of plaintiff in error does not set out any granted prayers or any of its instructions refused and makes no complaint of the rulings of the Court below upon them, as required by the rules of this Court, it is to be assumed that the only contention that it now makes is that the case ought to have been withdrawn wholly from the consideration of the jury. It is therefore our understanding that it is not now contended that the question of assumption of risk was not properly submitted to the jury on instructions, if the case was a proper one for the jury's consideration. (See defendant's brief, page 43.)

DEFENDANT'S THIRD SPECIFICATION

The Court of Appeals of Maryland did not err in holding that the State law as to assumption of risk applied to this case and not the Federal law.

The appellate court applied the Federal law and the State law as it exists in Maryland in passing upon the question of assumption of risk. In its opinion after discussing the rule of assumption of risk in Maryland courts and the Supreme Court of the United States, it says: Record p. 172.

"Upon this branch of the case the Act of Congress has no application, because section 4, by its terms, applies only in certain class of cases, of which this is not one, and if we take the rules as applied in the State Courts, the risks which are assumed by an employee are those incident to, or connected with, the work which the employees perform, not those which may exist in other portions of the establishment or yard where he himself has no duties and where he has the right to rely upon the master's having performed his entire duty. In the case of *McCann vs. Alt. Mills, 20 R. I. 566*, relied upon by the appellant, and which is the case most nearly approaching this in its facts, the Court did say, that "It was the duty of the employer to furnish his employees drinking water, but the fact that it was not so furnished does not warrant the plaintiff in wandering about the yard in the darkness in search of it, at any one's risk except his own;" the Court, however, in deciding the case places its decision not upon the assumption of risk, but of the contributory negligence of the plaintiff. So in this case, the act of the plaintiff in going about the yard as he did, was one to be viewed rather as contributory negligence than an assumption of risk, and that aspect of the case was fully and properly covered by the plaintiff's third prayer."

Judge Stockbridge in his opinion properly held that under the provisions of Section 4 of the Federal Employers' Liability Act of 1908, the defense of assumption of risk would still be available to the defendant as fully as though the Act had not been passed, but did not hold as set forth in defendant's brief, (Brief p. 11), that such defense is not to be determined by the Federal authorities, but by the State authorities. It is true that Judge Stockbridge says in his opinion "If we take the rules as applied in the State Courts, the risks which are assumed by an employee are those incident to, or connected with, the work which the employee performs,

not those which may exist in other portions of the establishment or yard where he himself has no duties and where he has the right to rely upon the master's having performed his entire duty." (Record p. 172), But this does not mean, as the defendant contends, (Brief p. 11) "That in every case what amounts to assumption of risk is always a matter to be determined by the various State Courts".

Indeed the Court of Appeals sustains its ruling that as a matter of law plaintiff did not assume the risk of the defendant's negligence in this case by citing the following cases in both the Federal Courts, as well as the State Courts:

Wood vs. Heiges, 83 Md. 257.
Seaboard Air Line vs. Horton, 233 U. S. 492, 58, L. Ed. 1062.
Byers vs. The Coal Co. 230 Pa. 10,
Southern Railroad Co. vs. Crockett, 234 U. S. 730.
McCann vs. Atlantic Mills, 20 Rhode Is. 566.

There is no difference between the rule in Maryland and the rule in the Federal courts as to assumption of risk for they both apply the rule of the common law.

Seaboard Air Line Ry. vs. Horton, 233 U. S. 506, 58 Law Ed. 1070, 239 U. S. 181.

In the case of *Mondou vs. N. Y. N. H. & H. Ry. Co.*, 223 U. S. 50, 56 Law Ed. 346, it is pointed out wherein the common law is departed from in the act of 1908, and the implication is that the common law as to assumption of risk prevails.

Since the English Judicature Act, the Courts of Maryland are the oldest common law courts existing in the world today and the Maryland reports of judgments in which the common law has been applied antedate those of any other state—Chief Judge McSherry—Maryland State Bar Association—1903.

In the case of *Texas & P. R. Co., vs. Archbald*, 170 U. S. 673, 42 L. Ed. 1191, the question of assumption of

risk was considered by this court and it was held that the employee has a right to rely upon the assumption that the appliances furnished are free from defects discoverable by proper inspection and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business or because by ordinary care he might have known of the methods and inferred therefrom that danger of unsafe appliances might arise.

This case arose in the State of Texas in a state court, was removed to the Circuit Court of the United States for the Eastern District of Texas, and the judgment for the plaintiff was affirmed by the Circuit Court of Appeals for the fifth district. In the opinion filed by this Court, the question of assumption of risk is fully discussed and the cases cited by the learned Chief Justice are all from the State of New York except one case, particularly applicable, from the State of Texas. No distinction is made as to the principles applicable in the State and Federal courts and no reference is made to causes adjudicated in the Federal Courts. Whatever may be the law applied to cases arising in other states of the Union, we respectfully submit that the law as applied in the Supreme Court of the United States as to assumption of risk is the same as that applied in the State of Maryland.

If however, any distinction existed, the law as it exists in the State of Maryland, would have to be applied to any case that might arise in the Courts of that State, involving the right of recovery under the Employer's Liability Act of 1908. So this Court has recently decided in the case of *Chicago and N. W. Ry Co., vs. William H. Gray*, 237 U. S. 401, 59 L. Ed. 1018, wherein Gray was a hostler at Antiga, Wisconsin, having various duties as to receiving and preparing engines for departure, including emptying ashes into a pit. Just before the accident he visited the pit to see whether the man there in charge was doing his work, and had walked northward a short distance along a path between the track and a coal shed, to a point opposite a

rest house, where he would wait his next call to duty. He started to cross the track to the rest house, and was struck by an engine coming from the South. The defendant proposed to offer evidence to show that it was an interstate road, and that the round house served indifferently, engines that passed the State line and those that moved within the limits of the State, but did not offer to show how the engine that struck Gray was engaged. The evidence was objected to, because it was not shown he was employed in interstate commerce at the moment of the accident. The argument of the railroad company was to bring the case within those of *Pederson* and *Seale* and *Zachary*. Although the Supreme Court of the United States did not express an opinion on this argument, it said:

> "It is suggested that the defendant could have argued that the plaintiff assumed the risk of this kind of negligence because he knew that it was a common occurrence for engines to run north of the cinder pit, not giving proper signals. Without considering whether the testimony warranted a finding that Gray assumed the risk of a fellow servant's negligence, we deem it enough to say that by the Wisconsin law assumption of risk is merely a case of contributory negligence and that the finding of the jury that the plaintiff was not guilty of contributory negligence excludes the possibility that he assumed the risk."

It seems, therefore, that the State law of Wisconsin as to assumption of risk was applied in this case by this Court.

It is clear, therefore, that the lower Court did not err in ruling upon the question of assumption of risk, whether the state law or the federal law was to be applied. Indeed the defendant has not pointed out in its brief any distinction between the rule of Maryland and the rule in the federal courts on assumption of risk.

CONCLUSION.

By the recent judgments of this court in a number of cases involving the Federal Employer's Liability Act of April 22nd, 1908, all the questions raised by the defendant in this record have been adjudicated. The plaintiff was called at 1 A. M. to enter upon his duties as front brakeman at 2 A. M., left his home at 1:30 A. M. and reported before two o'clock at the caller's office and went through the yard to his engine, arriving there at 1:55 A. M. He got on the engine, put on his working clothes, which were in a box on the tender, asked the fireman, who was the only man in charge that he saw, whether he was ready to start, and being told by the fireman that the tool-boy had been there and had forgotten to leave a tin cup and that he must first hunt up the tool boy and get a cup, he started out as directed, and seeing a moving lantern which he thought was held by the tool boy, started to go around an engine in search of him and met with the accident. The printed instructions to employees were that no trip was to be begun unless the engine was supplied with a certain list of articles, including drinking cups. (Record p. 70.) The accident happened June 23rd, 1913, and the rules of the Company promulgated January 1st, 1913, and in force at the time of the accident, provided that the front brakeman should be subject to the orders of the fireman in the absence of the engineer, and conductor. The plaintiff was then on duty, employed in interstate commerce and the engine and cars about to be connected to the engine were engaged in interstate commerce.

The injury was caused by the negligence of the defendant in respect to its appliances and equipment, and it was not for the Court to invade the province of the jury to pass upon this question.

North Carolina R. Co., vs. Zachary, 232 U. S. 256, 58 Law Ed. 595.

Missouri, K. & T. R. Co., vs. United States, 231 U. S. 112, 58 Law Ed. 144, 34 Sup. Ct. Rep. 26.

In the first of these cases, the employee was "on duty" and employed in commerce notwithstanding his temporary absence from the locomotive engine on a personal errand in the yard, and in the latter case the employee was held to be on duty, though inactive, but under orders and likely to be called upon at any moment.

See Pederson, vs. Delaware L. & R. R. Co., 229 U. S. 146, 57 Law Ed. 1125, 33 Sup. Ct. Rep. 648.
St. Louis S. T. & T. R. Co., vs. Seale, 229 U. S. 156, 57 Law Ed. 1129, 33 Sup. Ct. Rep. 651.
P. W. & B. R. R. Co., vs. Tucker, 35 App. D. C. 123, 220 U. S. 607, 55 Law Ed. 607.

We respectfully submit that the issues have been fairly submitted to the jury upon the numerous instructions granted by the court below and that no prejudicial error has been assigned and the judgment should be affirmed.

Respectfully submitted,

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BALTIMORE & OHIO RAILROAD COMPANY *v.* WHITACRE.

ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

No. 71. Argued November 7, 1916.—Decided December 4, 1916.

In the absence of clear and palpable error, this court will not disturb the concurrent findings of state trial and appellate courts upon the mere sufficiency of the evidence concerning negligence and assumption of risk in a case under the Employers' Liability Act.

Certain requests for instructions are here held rightly refused because of deficiencies in recitals of facts.

124 Maryland, 411, affirmed.

THE case is stated in the opinion.

Mr. Duncan K. Brent and *Mr. George A. Pearre*, with whom *Mr. A. Hunter Boyd, Jr.*, and *Mr. Geo. E. Hamilton* were on the brief, for plaintiff in error.

Mr. Frank A. Perdew and *Mr. Albert A. Doub* for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Whitacre, a freight train brakeman, while walking through a railroad yard on a dark and foggy night, fell into a water cinder pit and was seriously injured. He brought suit under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, in a state court and recovered a verdict. Exceptions were taken to certain refusals to rule. The Court of Appeals of Maryland affirmed the judgment of the court below. 124 Maryland, 411.

It appeared at the trial that, although the pit was of modern construction and well adapted to the purpose for which it was constructed, it was not protected by a guard rail. There was testimony that at the time of the accident certain lights alleged to have been provided about the pit were not lighted; that it had been raining; and that the top of the water was covered to some extent with ashes which made it difficult to distinguish the surface of the pit from solid ground. It was admitted that Whitacre was engaged in interstate commerce. The defences relied upon were assumption of risk and denial of negligence.

The defendant (plaintiff in error) requested a peremptory instruction in its favor, on the ground that there was not sufficient evidence to entitle the plaintiff to recover. The appellate court was unanimous in holding that the trial court had properly left the case to the jury. No

clear and palpable error is shown which would justify us in disturbing that ruling. *Seaboard Air Line Ry.* v. *Padgett*, 236 U. S. 668, 673; *Great Northern Ry. Co.* v. *Knapp*, 240 U. S. 464, 466. The defendant further complains that the trial court refused to give certain instructions on the issues of negligence and assumption of risk. These instructions were properly refused; because in each instance the recital therein did not include all the facts which the jury was entitled to consider on the issues presented and concerning which there was some evidence. The judgment is

Affirmed.